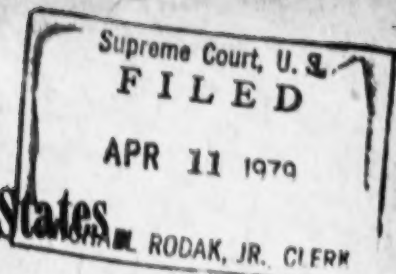


IN THE  
**Supreme Court of the United States**



October Term, 1978

No. ....

**78-1548**

**CALIFORNIA BREWERS ASSOCIATION, et al.,**

*Petitioners,*

**vs.**

**ABRAM BRYANT,**

*Respondent.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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## SUBJECT INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Statutory Provision Involved .....	3
Statement of Case .....	3
A. Respondent's Complaint .....	3
B. Statement of Facts .....	4
1. Parties .....	4
2. Collective Bargaining Agreement .....	4
a. The Separate Tiers of Seniority in the Brewery Industry .....	5
b. The Operation of Seniority in the Brewery Industry .....	5
C. Proceedings Below and Opinion of the Ap- pellate Court .....	7
Reasons for Granting the Writ .....	8

### I

This Case Presents an Important Issue in the Aftermath of Teamsters: The Definition of a "Seniority System" Under 703(h) .....	8
--	---

ii.

## II

Page

The Definition of "Seniority System" Employed by the Ninth Circuit Is in Direct Conflict With Teamsters, and the Definition Employed by the Sixth Circuit .....	10
---	----

## III

The Forty-Five Week Threshold Requirement to "Permanent" Status Is an Integral Component of the Brewery Industry's Seniority System .....	13
---	----

## IV

The Appellate Court Abused Its Authority When It Rendered Its Decision Without Factual Basis and Despite Clear Admissions by the Plaintiff..	15
--	----

## V

Conclusion .....	16
Appendix A. Opinion of the United States Court of Appeals, Ninth Circuit. Nov. 3, 1978 ..App. p.	1
TRASK, Circuit Judge, dissenting .....	13
Appendix B. Relevant Provisions of the Collective Bargaining Agreement .....	14

iii.

## TABLE OF AUTHORITIES CITED

Cases

Page

Alexander v. Machinists, Aero Lodge No. 735 (6th Cir. 1977), 565 F.2d 1364 .....	2, 8, 10, 11, 12, 14
East Texas Motor Freight System, Inc. v. Rodriguez (1977), 431 U.S. 345 .....	16
Griggs v. Duke Power Company (1971), 402 U.S. 424 .....	12
Hazelwood School District v. United States (1977), 433 U.S. 299 .....	16
Teamsters v. United States (1977), 431 U.S. 324 .....	2, 8, 9, 10, 11, 12, 13, 14, 15, 16

Statutes

Civil Rights Act of 1964, Title VII, Sec. 703(h) .....	2, 3, 8, 9, 10, 12, 13, 16
United States Code, Title 28, Sec. 1254(1) .....	2
United States Code, Title 42, Sec. 1981 .....	3
United States Code, Title 42, Sec. 2000e .....	3

Textbook

Aaron, B., "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L. Rev., pp. 1532, 1534 .....	13
--	----

IN THE  
**Supreme Court of the United States**

No. ....  
October Term, 1979

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*  
  
vs.  
  
ABRAM BRYANT,  
*Respondent.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

Petitioners California Brewers Association, Theo. Hamm Company, Anheuser-Busch, Inc., General Brewing Corporation, Falstaff Brewing Corporation, Miller Brewing Corporation, Joseph Schlitz Brewing Company and Pabst Brewing Company pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case.

**OPINIONS BELOW.**

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 585 F.2d 421, unofficially reported at 18 F.E.P Cas. 826 and is set forth in Appendix A. No opinion was rendered by the District Court for the Northern District of California.

### JURISDICTION.

Although the judgment of the Court of Appeals for the Ninth Circuit was entered on November 3, 1978, petitioners filed a timely motion for rehearing, which was denied on January 11, 1979. This petition for writ of certiorari was filed within ninety (90) days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

### QUESTIONS PRESENTED.

Collective bargaining agreements in force in an industry for almost 25 years include a provision that any employee who has worked for a minimum period in any calendar year is entitled to greater benefits and job security than other employees.

The questions presented are:

#### I

Whether this provision may be part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

#### II

Whether the Ninth Circuit's definition of seniority system conflicts with the definition of *Teamsters v. United States* (1977), 431 U.S. 324, and the definition of the Sixth Circuit in *Alexander v. Machinists, Aero. Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364.

#### III

Whether the Court of Appeals erred by summarily deciding the seniority system issue before the development of a factual record in the District Court in light of *Teamsters*.

### STATUTORY PROVISION INVOLVED.

Section 703(h) of Title VII provides in pertinent part:

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin; . . ."

### STATEMENT OF CASE.

#### A. Respondent's Complaint.

Respondent Abram Bryant filed his original Complaint on October 9, 1973, an amended Complaint on February 15, 1974, and a second amended Complaint on May 22, 1974. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. and provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, because of admitted "seniority and referral" provisions in the collective bargaining agreement. Bryant, the sole named plaintiff, purported to bring a class action on behalf of all black workers who ever have been or will be employed by any of the major breweries in California, as well as all black workers who ever have or will seek such employment.



## **B. Statement of Facts.**

### **1. Parties.**

Respondent Abram Bryant was first employed by Petitioner Falstaff in 1968. Since that time, he was employed from time to time by Petitioner Falstaff. After the original complaint, he worked for Petitioner Hamm for a brief period.

The defendants were an employer association, a union joint board, seven breweries, and six unions.

Respondent Bryant was subject to the provisions of the collective bargaining agreement between the breweries and the unions.

### **2. Collective Bargaining Agreement.**

The collective bargaining agreement in this case was between the California Brewers Association on behalf of various breweries and the Teamster Brewery and Soft Drink Workers Joint Board of California. It established an industry-wide seniority system, defined in Section 4 of that contract. Section 5 of the contract also governed the operation of the seniority system.<sup>1</sup>

The contract provided that an employee achieves permanent status and thereby acquires enhanced job benefits and security after working 45 weeks in one calendar year. The essence of Respondent's claim is that this provision perpetuates the present effects of past discrimination.

This 45 week provision has been in effect for almost twenty-five years. Respondent Bryant admits that he is unaware of any non-black employee who has achieved permanent status without meeting the 45 week requirement.

<sup>1</sup>Sections 4 and 5 are reproduced in Appendix B to this Petition.

### **a. *The Separate Tiers of Seniority in the Brewery Industry.***

The preamble to Section 4 specifically provides that with respect to Brewers and Bottlers there shall be five classes of employees "for the purposes of seniority only": (i) New employees; (ii) Apprentices; (iii) Temporary Bottlers; (iv) Temporary employees (other than Bottlers); (v) Permanent employees.

An individual's status in any of these classes (except apprenticeship) is solely a function of time served in a job classification in the industry.

Permanent employee status requires 45 weeks of employment within a calendar year in the brewing industry in the State of California. Temporary employee status requires at least 60 working days within a calendar year. Apprentices are covered by separate provisions. New employees are persons who do not qualify as a Permanent employee, Temporary employee or Apprentice.<sup>2</sup>

### **b. *The Operation of Seniority in the Brewery Industry.***

By satisfying the 45 week provision, the Permanent employee acquires rights to fill vacancies, or jobs held by Temporary or New employees. A Permanent employee who has been laid off by one employer

<sup>2</sup>Other sections of the collective bargaining agreement relate to the loss of seniority. For example, a Permanent employee who is not employed for a period of two years loses the status of a Permanent employee (Section 4(a)(5)). Similarly, an employee who quits the industry or is discharged for failure to comply with the union security requirements loses his status and seniority (Section 4(a)(5)). An example of the duality of the seniority system is apparent in this same section: a Permanent employee who is discharged by an employer loses establishment seniority with that employer but not industry seniority.

in the industry may be dispatched to another employer in the same area. The Permanent employee has a right to replace the temporary or new employee with the lowest plant seniority (Section 4(b)(7)). Industry seniority governs the choice between unemployed Permanent employees, insuring that the more senior Permanent will be entitled to a certain job (Section 5(c)(1)).

Within each class of employees, plant seniority operates (Section 4(c)). Any employee "bumped" by a Permanent employee will be the least senior employee at the particular plant.

Similarly, all lay-offs are decided on the basis of seniority (Section 4(c)(1-5)). New employees are laid off first, followed by Temporary employees. Permanent employees have the most job security. Within each classification, Permanent, Temporary or New, the least senior employee based on plant seniority is the first laid off and the most senior employee who is not working is the first rehired. Separate seniority lists are maintained for Apprentices.

Plant seniority dates from the first day of employment in the seniority tier within the establishment. When seniority of several employees dates from the same date, relative seniority is established based upon the length of service in California breweries (Section 4(c)(1)).<sup>3</sup>

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<sup>3</sup>An employee who has seniority at one establishment or plant but is working in another establishment can lose his seniority if he refuses recall to the first plant or establishment (Section 4(d)). However, an employee who accepts a transfer from one plant to another plant retains his first plant seniority for a period of two years from the date of transfer provided he is not recalled or does not transfer back to the first plant (Section 4(e)).

### **C. Proceedings Below and Opinion of the Appellate Court.**

On September 11, 1974, the district court granted motions to dismiss as to all defendants because of plaintiff's failure to state a claim upon which relief could be granted. Judgment was entered on October 18, 1974.

On November 3, 1978, the Court of Appeals for the Ninth Circuit, in a two to one decision, held that the plaintiff had stated a claim upon which relief could be granted. The Ninth Circuit held that the 45 week provision of the collective bargaining agreement was not a seniority system, or part of a system, and might violate Title VII. The case was remanded.



## REASONS FOR GRANTING THE WRIT.

### I

#### **This Case Presents an Important Issue in the Aftermath of *Teamsters*: The Definition of a "Seniority System" Under 703(h).**

The Court of Appeals adopted a highly unusual, restrictive, and erroneous definition of "seniority systems" which is in direct conflict with *Teamsters* and the definition of "seniority system" employed by the Sixth Circuit. *Alexander v. Machinists, Aero Lodge No. 735* (1977), 565 F.2d 1364.

In this respect, the Ninth Circuit's decision purports to state a rule of law. In the context of this case, the Ninth Circuit's decision arguably establishes the law of the case, barring the parties from ever developing a factual record regarding the operation of the brewery seniority system. In other words, if the Ninth Circuit's decision is allowed to stand, the parties will be arguably bound by the Ninth Circuit's premature and erroneous holding, with no opportunity to present the factual evidence necessary to demonstrate the impropriety of the Ninth Circuit's definition. At the least, the case should be remanded, with instructions to consider the case in light of *Teamsters*.

Thus, this case presents a question of paramount importance to the continuing viability of Section 703(h) and this Court's decision in *Teamsters*. The Ninth Circuit has, in effect, disregarded *Teamsters*. It did not examine the bona fides of the system, which is the only limitation on the protectibility of seniority systems under Section 703(h). Instead, without the benefit of an adequate factual record the Ninth Circuit has dissected an operating seniority system, selecting one com-

ponent of that system for judicial scrutiny under Title VII. By holding that this one component was neither a seniority system nor part of a seniority system, the Ninth Circuit found that the provision might violate Title VII, despite the comprehensive protections of Section 703(h) and the lesson of *Teamsters*. If courts are permitted to select such individual components as targets for Title VII attack, the myriad of diverse, complex seniority structures in American industry are as vulnerable as before *Teamsters*, despite Section 703(h).

*Teamsters* explicitly states the principle that no type of seniority system is preferred under Title VII. 431 U.S. 355, n.41. This principle is critically important to the operation of bona fide seniority systems. The vitality of this principle is the central issue that must be confronted by this Court in the aftermath of *Teamsters*.

The decision of the Ninth Circuit on the "seniority" issue is also contrary to (i) the admissions of all parties in this case that the 45 week requirement was part of a seniority system; (ii) uncontroverted facts concerning the character, operation and structure of the seniority system; and (iii) the explicit admonitions of the Supreme Court in *Teamsters*. Indeed, the Ninth Circuit decided that this component was neither a seniority system, nor part of a seniority system despite the fact that all parties initially and extensively briefed the issue assuming and admitting that the 45 week requirement was part of a seniority system.

II

**The Definition of "Seniority System" Employed by the Ninth Circuit Is in Direct Conflict With Teamsters, and the Definition Employed by the Sixth Circuit.**

In *Teamsters v. United States*, the Supreme Court held that the scope of Section 703(h) was comprehensive and inclusive, including no distinctions between different forms of seniority.

"There is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, *seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression.* The legislative history contains no suggestion that any one system was preferred." [Emphasis added].

*Teamsters v. United States*, 431 U.S. 324, 355, n.41.

In so holding, this Court recognized the great diversity in seniority systems throughout the nation. Generally, seniority is the measure of time with an industry, employer, plant, department or job. A seniority system usually contains rules of when and how to measure seniority, and to apply seniority to such employee decisions as promotions, assignments, referrals, lay-offs, wages, shifts, overtime and many other similar situations. *All* of these elements make a seniority system.

Following *Teamsters*, the Sixth Circuit in *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, adopted this realistic view of seniority systems. The district court in *Alexander*, in its opinion,

stressed that the "job equity" feature of the seniority system perpetuated the present effects of pre-Act discrimination. This "job equity" feature is very similar to the 45 week provision in the instant case. It gives an absolute preference in filling a vacancy to employees with prior, satisfactory service in the particular occupation. In other words, under this "job equity" provision, whenever a vacancy occurred, all employees having "equity"—that is, prior satisfactory service in the occupation—were given the right to return to the job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. The effect of the "job equity" feature of the seniority system was that an employee with equity would always be preferred over an employee without equity even though the latter was deemed qualified for the position and had longer plant-wide service.

The Sixth Circuit's decision follows *Teamsters*:

"Like the Supreme Court in *Teamsters*, we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters*, it applies equally to all races and ethnic groups. To the extent that it "locks" employees into . . . jobs, it does so for all."

"With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. *The Act, however, speaks not simply of seniority but of a ['] bona fide seniority . . . sys-*

tem.' A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.

"Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination. [Emphasis added.]" [Footnotes omitted.]

*Alexander v. Machinists, Aero Lodge No. 735* (1977), 565 F.2d 1364, 1378-1379.

The decision of the Ninth Circuit in the instant case conflicts with both the Sixth Circuit in *Alexander*, and this Court in *Teamsters*. This decision of the Ninth Circuit fails to recognize the diversity of seniority provisions. Since these systems are the products of collective bargaining, geared to the individual needs of individual businesses and industries, the systems have been developed in a myriad of ways.

If, as the Ninth Circuit decision signifies, the individual components of a seniority system may be subject to Title VII attack under the doctrine of *Griggs v. Duke Power Company* (1971) 401 U.S. 424, then the purpose of Section 703(h) and the holding of the Supreme Court in *Teamsters* will be frustrated. By deciding that the 45 week provision is not even part of a seniority system, the Ninth Circuit

has endangered a great number of the seniority systems currently in operation throughout the United States. If allowed to stand, this ruling would invalidate such seniority systems despite the intended operation of Section 703(h).

### III

#### **The Forty-Five Week Threshold Requirement to "Permanent" Status Is an Integral Component of the Brewery Industry's Seniority System.**

Prior to any final decision that the 45 week provision may not be a protected part of a seniority system within the meaning of Section 703(h), the diverse character, definition and structure of seniority systems must be examined carefully in light of *Teamsters*.

"Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. For the purposes of this discussion it is unnecessary to review the different types, which range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity."

B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1534.

The 45 week provision is virtually indistinguishable from any number of seniority devices commonly employed in American industry.

First, the 45 week provision defines the extent of service which is a condition precedent to a higher



level of seniority job rights. Any number of probationary periods, eligibility requirements, or other threshold standard serve the same purpose: creating a tier of job rights distinguishable from those afforded to temporary, part-time or seasonal employees. In *Alexander*, a separate tier of seniority based on "job equity" was created, providing for the same type of preference as exists in the instant case for "permanent employees."

Second, the provision for minimum service in one calendar year is also similar to common definitions of seniority. A probationary period might require thirty days work in a two or three month period. Also, accumulated credit toward seniority is often lost due to time off—even due to lay-off. In this case, the contract provides, in essence, that more than seven weeks unemployment in a calendar year will cause loss of accumulated credit.

Finally, seniority may be "measured in a number of ways", *Teamsters v. United States*, 431 U.S. at 355, including some ways less related to a simple linear measurement of time than in the brewery system. Businesses, with seasonal changes, such as department stores or delivery companies often provide that seniority cannot be accumulated during those periods when the work force swells due to part-time or seasonal hires. Also, the device of superseniority is often used to protect the job security of union officials, without regard to actual time served.

The brewery seniority system must be viewed as one integrated structure, divided into separate tiers of seniority service, job security and benefits—defined only by a standard of *service in a particular job classification*. In short, the labor contract creates a seniority system, and the 45-week provision is part of that system.

#### IV

### **The Appellate Court Abused Its Authority When It Rendered Its Decision Without Factual Basis, and Despite Clear Admissions by the Plaintiff.**

At all times prior to this Court's decision in *Teamsters*, Respondent Bryant *proclaimed* that he was attacking a seniority system which had the effect of perpetuating the present effects of past discrimination.

In the verified Second Amended Complaint, Respondent Bryant averred: "The vehicles for the perpetuation of this invidious discrimination are the *seniority* and referral provisions of the collective bargaining agreement, which were negotiated a number of years ago. [Emphasis added]" Second Amended Complaint ¶14. Respondent's characterization of the 45 week provision as a "seniority" provision was repeated frequently throughout the complaint. *Id.* ¶¶15, 23, 24.

On appeal, respondent contended that "*a seniority system like the instant one . . .*, though it now may be operating with an even hand, has the effect of perpetuating the discrimination of the past." [Emphasis added]. (Opening Brief for Appellant, p. 10). Throughout all briefs filed by all parties on this appeal prior to the Supreme Court's decisions in *Teamsters* and *Evans*, there is not the slightest suggestion that the 45 week provision was not part of the seniority system.

Indeed, only after the Supreme Court's decision in *Teamsters* and *Evans*, after all other briefs had been filed, and after the employers had no opportunity for reply, did the respondent first suggest that the 45 week provision might not be a seniority system (Appellant's Supplemental Memorandum of Points and Au-

thorities, p. 3, filed July 17, 1977). Even at this late date, the respondent conceded that the overall seniority system was immune from attack under Title VII. "Notice *we are not calling into question the overall seniority system* in the brewery industry; for the system—even though it admittedly perpetuates the discrimination of the past—is beyond attack under the Supreme Court's decisions." *Id.*, pgs. 3-4 [Emphasis added].

As a result, *the essence of the issue—the relationship of the 45 week provision to the overall seniority system—decided by the Ninth Circuit was never briefed, argued or considered in light of a full factual record.* The absence of any factual record is a fatal flaw in the judgment of the Ninth Circuit—a judgment which purports to establish the law of the case.

The Ninth Circuit erred by summarily denying the seniority character of the brewery system before the trial court had an opportunity to gather the evidence and make the appropriate factual findings. *Cf. Hazelwood School District v. United States* (1977), 433 U.S. 299; *East Texas Motor Freight System, Inc. v. Rodriguez* (1977), 431 U.S. 345.

## V

### Conclusion.

*Teamsters v. United States* interpreted Section 703 (h), reaffirming the congressional decision to place bona fide seniority systems beyond the reach of Title VII. By contrast, the Ninth Circuit's decision purports to establish a rule of law that threatens the flexibility, diversity and adaptability of seniority systems to the different industries of America, contrary to the explicit congressional purpose embodied in Section 703(h).

If the Title VII protection for seniority systems is to be effective, this Court must adopt a realistic definition of seniority systems and safeguard specific components of such systems from attack.

For these reasons, petitioners respectfully submit that a writ of certiorari should issue.

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**APPENDIX A.**

No. 75-1263.

United States Court of Appeals,  
Ninth Circuit.

Nov. 3, 1978.

Abram Bryant, Individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. California Brewers Association, Miller Brewing Company, Joseph Schlitz Brewing Company, Anheuser-Busch, Incorporated, Pabst Brewing Company, Theodore Hamm Company, General Brewing Company, Falstaff Brewing Corporation, Teamster Brewery and Soft Drink Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 856 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Salesdrivers and Dairy Employees Union Local 166 in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Bottlers Union Local 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Beer Drivers and Salesmen's Union Local 888 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Union Local 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Salesdrivers, Helpers, and Dairy Employees Union Local 683 of the International Brotherhood of



Teamsters, Chauffeurs, Warehousemen and Helpers of America, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California.

Before HUFSTEDLER and TRASK, Circuit Judges, and PREGERSON,\* District Judge.

PREGERSON, District Judge:

### INTRODUCTION

This appeal from the trial court's order dismissing the action pursuant to F.R.Civ.P. 12(b)(6) requires us to consider whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, may be violated by a 20 year old provision in a statewide brewery industry collective bargaining agreement. That provision in effect preserves an all White class of permanent brewery employees by defining a permanent employee as a brewery worker employed for at least 45 weeks in one calendar year. Permanent employees enjoy valuable employment benefits denied temporary employees. We conclude that this provision may violate Title VII. Accordingly, we reverse the district court's order of dismissal and remand this case for further proceedings.

In 1968 plaintiff Abram Bryant, a Black person and a member of Teamsters' Local 856, got his first brewery worker's job with Falstaff Brewing Company in Northern California. Bryant earned his living working for Falstaff until 1973 when he went to work for Theodore Hamm Company. In 1974 when this action

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\*The Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation.

was filed, despite 6 years of brewery experience, Bryant was still classified as a temporary employee because of his inability to satisfy the 45-week provision in the collective bargaining agreement between all major California breweries and brewery unions.<sup>1</sup> Under this provision, found in section 4 of the agreement, a temporary employee must work 45 weeks in one calendar year before he is classified as permanent<sup>2</sup> and entitled to additional fringe benefits and greater job security. On its face the requirement appears innocuous. The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year.

The effect of the 45-week requirement has been to deny Bryant and other similarly-situated Black brewery workers<sup>3</sup> the opportunity to be classified as permanent employees: no Black has ever attained permanent employment status in a California brewery. Bryant's second amended complaint therefore alleges that the

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<sup>1</sup>The collective bargaining agreement was signed by all seven brewery defendants and all union defendants. It has statewide coverage. The agreement was negotiated on behalf of the breweries by defendant California Brewers Association and on behalf of the unions by defendant Teamsters Brewery and Soft Drink Workers Joint Board.

<sup>2</sup>Section 4(a)(1) of the collective bargaining agreement provides in part as follows: "A permanent employee . . . is any employee . . . who . . . has completed forty-five weeks of employment under this Agreement . . . in one calendar year as an employee of the brewing industry in this State. . . ."

<sup>3</sup>Although filed as a class action, the matter has not been so certified pursuant to F.R.Civ.P. 23(c)(1).

requirement violates 42 U.S.C. § 2000e-2(a) and (c),<sup>4</sup> prohibiting employers and unions from discriminating with respect to employment on account of an "individual's race, color, religion, sex, or national origin," and 42 U.S.C. § 1981,<sup>5</sup> prohibiting racial discrimination in the making and enforcement of contracts.

Although Bryant's attack is directed primarily against the 45-week requirement, the complaint also alleges violations of § 2000e-2(a)(1) and (c)(2), i.e., that defendant breweries and defendant unions have discriminated against Blacks in hiring and referring them to available brewery jobs. Finally, the defendant unions,

<sup>4</sup>42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire . . . any individual, or . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(c) provides:

It shall be an unlawful employment practice for a labor organization—

- (1) to . . . discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to . . . classify its membership . . . or to . . . fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

<sup>5</sup>42 U.S.C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."

according to Bryant, have breached their duty of fair representation under 29 U.S.C. §§ 159(a) and 185(a) by negotiating an agreement containing discriminatory provisions.

The district court concluded that the procedures complained of by Bryant were analogous to the "last-hired, first-fired" practices permitted under Title VII<sup>6</sup> and granted defendants' motion to dismiss the action for failure to state a claim upon which relief can be granted. This appeal followed.

### PRELIMINARY ISSUES

[1] At the outset, two preliminary issues call for consideration. First, we are asked to disallow the joinder of Southern California breweries as defendants because Bryant neither worked nor sought work in those breweries. Southern California breweries, however, are signatories to the statewide collective bargaining agreement and, as such, support and maintain the disputed contract provisions. Moreover, under the collective bargaining agreement Bryant and other Black brewery workers are eligible to work in Southern California breweries as well as in Northern California breweries. Accordingly, we find that the Southern California breweries have a sufficient connection with this lawsuit to justify their joinder under F.R.Civ.P. 20(a).

[2] Second, defendants ask us to find that the district court lacks subject matter jurisdiction over

<sup>6</sup>See *Watkins v. Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Jersey Central Power & Light v. Local Union 327*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied* 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied* 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976).

this case. Title VII requires the Equal Employment Opportunity Commission (EEOC) to conciliate complaints within 180 days following the filing of the charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1). At the end of the 180-day period, § 2000e-5(f)(1) permits the EEOC to issue a notice of right-to-sue authorizing the complainant to file suit in federal court. Bryant filed his charge with the EEOC on May 4, 1973. The EEOC issued a right-to-sue letter on July 23, 1973, 80 days later. Bryant then filed suit in the United States District Court for the Northern District of California on October 19, 1973, 12 days shy of 180 days. Defendants contend that the EEOC's failure to observe the 180-day time period bars plaintiff's claim on the Title VII charge.

[3] Defendants' contention lacks merit. Section 2000e-5(f)(1) simply requires the EEOC to issue a notice of right-to-sue if it has failed to file suit or arrange a conciliation agreement within 180 days. Nowhere does the statute prohibit the EEOC from issuing such notice before the expiration of the 180-day period.

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or entered into a conciliation agreement . . ., the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge [in the appropriate United States District Court] . . . . 42 U.S.C. § 2000e-5(f)(1).

Furthermore, in 1973-1974 the undermanned EEOC staff faced a huge backlog of Title VII cases and, as a

practical matter, was unable to handle Bryant's charges within the 180-day period. Given this state of affairs, it would be a travesty to require the EEOC and Bryant to mark time until 180 days were counted off.

[4] Title VII "does not condition an individual's right to sue upon the EEOC's performance of its administrative duties." *Jefferson v. Peerless Pumps*, 456 F.2d 1359, 1361 (9th Cir. 1972). In the circumstances of this case, we decline to hold that Bryant's Title VII claim is barred by any lack of compliance with the procedural requirements of § 2000e-5(f)(1).

Having treated these preliminary matters, we now turn our attention to the question whether Bryant's complaint alleges a claim for relief under Title VII.

#### TITLE VII ALLEGATIONS

[5] Bryant was denied the opportunity to prove his Title VII allegations when the district court dismissed the action pursuant to F.R.Civ.P. 12(b)(6). For purposes of this appeal, the complaint is construed in the light most favorable to Bryant and its allegations are taken as true. 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1357 (1969).

[6] After this case was first briefed and argued,<sup>7</sup> the Supreme Court decided three cases bearing on the Title VII claim: *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *East Texas Motor Freight Systems Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396

<sup>7</sup>The parties were permitted to file additional briefs addressing the issues raised by these three cases.



(1977). These cases hold that a bona fide seniority system that applies equally to all workers and is free of an intent to discriminate on the basis of race, color, religion, sex, or national origin in its genesis, negotiation, and maintenance is immunized by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h),<sup>8</sup> even though the system perpetuates the effects of racial discrimination predating the effective date of Title VII.<sup>9</sup> Defendants assert that the 45-week requirement is a bona fide seniority system. They argue that even if Blacks are now foreclosed from attaining permanent status, such a result merely perpetuates the effects of possible pre-Title VII racial discrimination. Thus, defendants conclude that § 703(h) validates this requirement.

[7] The approach advanced by defendants overlooks the critical question whether the 45-week requirement, found in section 4 of the collective bargaining agreement, is in fact a seniority system or part of such a system. Section 4(a)(1) provides in part as follows: "A permanent employee . . . is any employee . . . who . . . has completed forty-five weeks of employment under this Agreement . . . in one calendar year as an employee of the brewing industry in this State. . . ." No comprehensive definition of "seniority system" is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the

<sup>8</sup>Notwithstanding other provisions of Title VII, § 703(h) provides in part that it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . ." 42 U.S.C. § 2000e-2(h).

<sup>9</sup>The effective date of Title VII is July 2, 1965.

fundamental component of such a system. Accordingly, we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination.

[8] The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases. "Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv.L.Rev. 1532, 1534 (1962).<sup>10</sup>

In contrast, the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service. Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees. Although an employee must work at least 45 weeks before becoming a permanent employee, the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees

<sup>10</sup>An employee's seniority rights generally are measured by his or her length of service in a particular area, whether it be a particular job unit ("unit seniority"), a plant ("plant seniority"), a company ("company seniority"), or even an industry. See *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 732 & n. 21 (5th Cir. 1976), which discusses methods used to calculate seniority in the context of formulating remedies for discrimination. Moreover, some seniority systems adopt a combination of these approaches, using different seniority measures for different purposes. For example, in *Teamsters*, company seniority was used to calculate employee benefits; bargaining unit seniority was used to determine order of layoffs.

could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year. This feature distinguishes the challenged system from the seniority system considered in *Teamsters*. In *Teamsters*, the use of different measures of seniority for different purposes meant that employees might have greater seniority rights for some purposes than for others. But employees with fewer weeks of service in a particular area (company or bargaining unit) could never acquire greater benefits within that area than employees with longer service there. Under the 45-week requirement, less senior employees could acquire greater rights regardless of whether one measures seniority by length of employment in a bargaining unit, plant, company, or industry.

Clearly, section 4(a)(1) does not provide for incremental increases in employment rights or benefits based on length of overall service. By its nature, the 45-week provision is an all-or-nothing proposition. Once an employee has worked 45 weeks in any calendar year, he is classified as a permanent employee. Until that time, it makes no difference how long a person has been employed by a department, plant, company, or industry, or how close he may have come to satisfying the 45-week requirement. So long as he does not happen to work 45 weeks in any particular calendar year, he remains a temporary employee. Unlike employees

who must complete a probationary period before acquiring greater rights, temporary employees under the 45-week rule may never be able to achieve permanent status.

Under a seniority system, rights normally accrue automatically in the absence of resignation, termination, or transfer. Under the 45-week requirement, however, an employee's chances of satisfying the provision automatically terminate at the end of each year. This aspect of the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status. Because seniority rights under a true seniority system usually accumulate automatically over time, it is difficult to manipulate them in a discriminatory manner.

Section 4(a)(1) is simply a classification device that divides brewery industry employees into two groups. This conclusion is reinforced by the text of the collective bargaining agreement. Section 4(a)(1) is one of four subsections that define "five classes of employees." The classes of employees are permanent employees, temporary employees, temporary bottlers, apprentices, and new employees. The 45-week provision establishes a dividing line between two classes of these employees, temporary and permanent. Under separate provisions of the contract, each of the employees in these classes accumulates plant seniority from the date

of first employment in the class. But plant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically. Thus, while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it.<sup>11</sup>

### CONCLUSION

Because the 45-week provision is not part of a seniority system, plaintiff is not required to prove any form of intentional discrimination to make out a Title VII violation. Instead, the normal rule applies that "a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters*, 431 U.S. at 349, 97 S.Ct. at 1861. The controlling principle is that such employment practices which have discriminatory impact violate Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).<sup>12</sup>

If plaintiff is able to prove his averment that the provisions of the collective bargaining agreement were discriminatorily applied, he may then be entitled to

<sup>11</sup>The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.

<sup>12</sup>Section 703(h) of Title VII does not protect seniority systems that are themselves discriminatory or that had their genesis in racial discrimination. Because we have held that the 45-week provision was not part of a seniority system, we are not required to address the question whether the provision was part of an unprotected seniority system, *i.e.*, one that is not bona fide.

relief under *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

Accordingly, the judgment must be reversed and the cause remanded to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, under standards enunciated in *Griggs*. On remand the district court should also consider whether plaintiff has made out a claim for relief under 42 U.S.C. § 1981 and 29 U.S.C. §§ 159(a) and 185(a).

Reversed and remanded for further proceedings consistent with the views herein expressed.

TRASK, Circuit Judge, dissenting.

I would respectfully dissent from Judge Pregerson's conclusion that the allegations in Bryant's pleadings could state a cause of action in light of the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). I would therefore affirm the district court's decision dismissing this action.



## APPENDIX B.

### Relevant Provisions of the Collective Bargaining Agreement.

Section 4. (a) With respect to Brewers, Bottlers, Drivers and Shipping and Receiving Clerks and Checkers for the purposes of seniority only there shall be five classes of employees, as follows:

Permanent employees

Temporary employees (other than Bottlers)

Temporary Bottlers

Apprentices

New employees

Subject to the provisions of Sections 4 (1) and 43. The term temporary employee includes a temporary bottler unless the reference expressly negates such an inclusion.

(1) A permanent employee (other than Bottlers) is any employee other than an apprentice who, subject to subsection "(a)(5)" following, has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in this State. Temporary Bottlers shall be entitled to the full rate and permanent status after they have worked 1600 hours in a calendar year. Hours worked since January 1, 1970 shall count for this purpose.

Time lost because of sickness or injury, leave of absence, or vacation shall not be counted as "employment under this Agreement" for the purposes of this section.

All employees, except apprentices, who are on the date of this Agreement qualified as permanent em-

ployees under the provisions of the brewers' distributors' agreement previously in effect with the Teamster Brewery & Soft Drink Workers Joint Board of California and those employees covered by this Agreement who have qualified for a vacation based on employment in California as a brewer, bottler, driver or helper, or checker or shipping or receiving clerk under the provisions of a contract with another labor organization in the prior year for an employer covered hereby shall be considered permanent employees.

(2) A temporary employee (other than Bottlers) is any person other than a permanent employee or an apprentice who worked under this agreement or predecessor agreements in the preceding calendar year for at least sixty (60) working days, subject to subsection "(a) (6)", or who was a temporary employee when he entered the armed services and retains such status; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5 (b) is not given the status of a temporary employee by such employment.

A temporary Bottler is any Bottler other than a permanent Bottler as set forth in Section 4(1).

(3) An apprentice is an employee whose employment is governed by the provisions of this Agreement applicable to apprentices. An apprentice upon completion of his apprenticeship period shall take the status of a permanent employee and his seniority as a permanent employee shall commence as of the date of his employment as an apprentice.

(4) A new employee is any employee who does not qualify as a permanent employee, a temporary

employee or an apprentice; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5(b) is not given the status of a new employee by such employment. On December 31 of each year, all new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months shall become temporary employees.

(5) A permanent employee who is not employed under this Agreement for any consecutive period of two (2) years shall thereupon lose his status as a permanent employee hereunder, provided, however, that the period of two years will be extended for any period of incapacity. A permanent employee who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A permanent employee who has been discharged by any Individual Employer in the exercise of his management function shall thereby lose all seniority with such Individual Employer. Such person may regain his status as a permanent employee by being re-employed subject to this Agreement within two (2) years from such quitting or discharge.

(6) A temporary employee who is not employed subject to this Agreement for a period of one (1) year shall thereupon lose his status as a temporary employee. A temporary employee or new employees or apprentice who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A temporary employee who has been discharged by

an Individual Employer in the exercise of his management function shall thereby lose all seniority with such individual Employer. Employment prior to such loss of status under this subsection shall not be counted thereafter in determining the seniority or status of such a person.

(7) A new employee who fails to qualify for transfer to temporary employee status at the end of a year shall lose his status as a new employee.

(b) A permanent employee who has been laid off and not discharged by an Individual Employer in the exercise of management's function may be dispatched—if such employee so desires—for work in any establishment of any Individual Employer in the local area of his last employment and shall have the right to replace—as of Monday—the temporary employee or new employee with the lowest plant seniority therein employed regardless of anything in this Agreement to the contrary. The Individual Employer need not employ such permanent employee unless he is competent to fill the position held by the temporary employee or new employee who is to be replaced.

(c) A seniority list for each of the five classifications of employees shall be maintained for each establishment of each Individual Employer. The last employee on the seniority list of the establishment who is working in the establishment shall be the first laid off, and the first employee on the seniority list of the establishment who is not working in the establishment shall be the first rehired. Each such seniority list shall be based on the following: Sections of the list:

(1) The first portion of the seniority list shall comprise the permanent employees other than Bottlers hav-

ing seniority in the establishment arranged in descending order of their seniority.

(2) The second portion of the seniority list shall comprise the temporary employees other than Bottlers having seniority in the establishment, arranged in descending order of their seniority.

(3) The lowest portion of the seniority list shall comprise the new employees having seniority in the establishment arranged in descending order of their seniority.

(4) Permanent and Temporary Bottlers entitled to seniority shall be placed on a separate seniority list which shall follow the procedure set forth in subsections (c)(1) and (c)(2) above.

(5) A separate list shall be maintained for apprentices.

#### *Seniority Dates of Individual Employees*

(1) The plant seniority of each permanent employee shall date from the first day of his employment as a permanent employee or apprentice in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several permanent employees dates from the same day, their relative seniority as permanent employees shall be in accord with their length of service in the industry in California.

(2) The plant seniority of each temporary employee shall date from the first day of his employment as a temporary employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several temporary employees dates from the same day, their

relative seniority as temporary employees shall be in accord with their length of service in the industry in California subject to (4) hereof.

(3) The plant seniority of each new employee shall date from the first day of his employment as a new employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several new employees dates from the same day, their relative seniority as new employees shall be in order of hire in accordance with 5(a)(3).

(4) On December 31 of each year, the names on the list of new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months, on that date shall be transferred, in the existing sequence to the end of the list of temporary employees.

(d) An employee having seniority in one establishment while working in another establishment and who leaves the other establishment while work is available to him there in order to maintain his seniority in the first establishment shall lose plant seniority in the other establishment. An employee who elects to remain at work at the other establishment shall lose plant seniority in the first establishment.

(e) In all cases in which a permanent employee accepts a transfer from one establishment of an Individual Employer to another establishment of such Individual Employer in the local area, such employee shall retain for a period of two years from the date of such transfer his plant seniority rights in the establishment from which he was transferred. He may, upon



thirty (30) days' notice to the employer, within such two-year period, return to the individual establishment from which he was transferred and the Individual Employer may transfer such employee back to such establishment at any time within such period. In either case, his plant seniority rights therein shall be the same as if he had not accepted such transfer in the first place.

(f) Apprentices shall be subject to seniority only as between apprentices working for the same brewery establishment. Discharge by any Individual Employer in the exercise of his management function terminates all seniority rights of an apprentice.

(g) Any person employed without seniority shall gain no seniority if a person with seniority reports for such work within forty-eight (48) hours of his employment.

(h) The Individual Employer has the right to increase or reduce the number of employees at any time subject to the provisions of this Agreement.

(i) (1) Regardless of anything to the contrary in this contract contained, an Individual Employer cannot be compelled to re-employ any employee, permanent or temporary or new or applicant or apprentice, who has been previously discharged by such Individual Employer in the exercise of his management function, provided, however, that he may re-employ such employee if he so desires. If such Individual Employer does re-employ such discharged employee, such re-employed employee's plant seniority shall start from the date of such re-employment.

(2) Regardless of anything to the contrary in this Agreement, any permanent, temporary or new employee

who is discharged for dishonesty shall lose his status and seniority, if any, as of the date of such discharge, and employment prior to such loss of status and seniority shall not be counted thereafter for any purpose. Pilfering of cases or inducing bottlers or loaders to give drivers extra bottles shall be regarded as dishonesty and dealt with as above set forth. The furnishing of surety bonds against embezzlement shall be left to Individual Employer's discretion; provided, however, that said Individual Employer shall be required to pay the premium on said bond and provided further that said bond shall in no way be construed as affecting said employee's union obligation.

(j) A driver, helper or servicer covered by this contract who accepts a salesman, salesman-displayman, or displayman's job with his employer for whom he is at that time working in a classification covered by this Agreement shall, so long as he stays in the employ of the same employer at the same establishment, retain his seniority under this Agreement in such employer's establishment. If he is laid off or terminated (other than discharged for cause) from the salesman, salesman-displayman or displayman's job by such employer he may exercise such retained seniority rights provided he does so within thirty (30) days of such lay-off or termination. Should he leave the employ of such employer, he shall lose his seniority rights with such employer but shall retain his status in the industry subject to Sections 4 (a)(5) and 4 (a)(6) of this Agreement.

(k) Regardless of anything in this Agreement to the contrary, in the event that a permanent employee is laid off, he may register on the out-of-work list in any classification covered by this Agreement and

shall be eligible to be dispatched upon the exhaustion of the temporary employees out-of-work list. In the event a salesman, salesman-displayman or displayman with five (5) years seniority in the industry in such classification or classifications who is laid off or terminated (other than discharged for cause) from such salesman, salesman-displayman or displayman's job shall be eligible to be dispatched as a permanent driver hereunder. Such employee shall accrue no seniority if dispatched in a classification other than that in which he is a permanent employee and shall have no right to bump on such dispatch, although he shall maintain and accrue seniority as such permanent employee. The Individual Employer need not employ such permanent employee unless he is competent to perform the work when dispatched in a classification other than that in which he is a permanent employee.

Salesmen, Salesmen-displaymen and Displaymen who have been employed in the industry for sixty (60) days or more shall be considered permanent employees for the purposes of registering only.

(1) (I) A Temporary Bottler is any Bottler other than a permanent Bottler.

(2) After completion of the probationary period specified in Section 31, Temporary Bottlers shall have seniority for dispatch and layoff purposes only among Temporary Bottlers. After completion of such probationary period their seniority shall be retroactive to the first day of employment in that calendar year.

(3) Temporary Bottlers may not be employed in a previously established bumping area so long as a permanent Bottler is available for employment in such previously established bumping area.

(4) A Temporary Bottler shall lose his seniority if not employed under this Agreement for one (1) year and for other reasons set forth in this Agreement providing for loss of seniority.

(5) (a) Temporary Bottlers shall work only in the classification in which dispatched. They shall receive vacation, holiday, overtime, shift differential fringes only. Pension contributions shall be made for Temporary Bottlers from the first compensable hour. Health and welfare contributions for Temporary Bottlers shall commence after the probationary period has expired. Temporary Bottlers shall be entitled to receive permanent Bottlers' pay after they have worked 3000 hours of employment under this Agreement in one classification in two consecutive calendar years as an employee of the brewing industry in this State. Hours worked since January 1, 1970 shall count for this purpose.

(b) If permanent Bottlers are available, temporary Bottlers shall work no overtime, unless a part of an entire crew.

(c) Temporary Bottlers shall be employed on a day to day basis.

*Section 5.* (a) The Individual Employer must secure all employees covered by this Agreement through the employment offices of the Local Union affiliated with the Teamster Brewery & Soft Drink Workers Joint Board of California, with jurisdiction.

With respect to Brewers, Bottlers, (Drivers) and Shipping and Receiving Clerks and Checkers for the duration of this agreement, satisfactory and competent men will be furnished within forty-eight (48) hours and in the event they cannot be or are not furnished, the Individual Employer may employ any person.

(b)(1) If the Individual Employer requests employees (except Bottlers) for work for less than thirty-seven and one-half ( $37\frac{1}{2}$ ) straight-time hours the Local Union shall dispatch those employees readily available for dispatch and the Individual Employer may hire for such work any unemployed permanent, temporary employee, new employee or applicant for employment, without regard to seniority and such employee shall establish no seniority rights by reason of such employment for such work.

(2) If the Individual Employer requests Bottlers for work for less than thirty (30) straight time hours in a calendar week, the Local Union shall dispatch Temporary Bottlers who are registered for employment in the order of their experience in the industry and when the list of such persons is exhausted, in the order of their registration.

(c) In all other cases the Local Union shall dispatch and the Individual Employer shall hire as follows:

(1) In dispatching the Local Union shall first dispatch in accordance with the seniority provisions set out in Section "4" hereof in descending order of seniority, the employee with the highest seniority to be dispatched first.

(2) In the case of Brewers, Drivers, Shipping and Receiving Clerks and Checkers the Local Union shall next dispatch permanent employees registered in the established area who may be unemployed and thereafter temporary employees registered in the established area who may be unemployed and thereafter new employees who may be unemployed, subject to Section 43. In the case of Bottlers the Local Union shall next dispatch permanent Bottlers registered in the previously estab-

lished bumping area who may be unemployed, and thereafter permanent employees registered in the previously established bumping area in other classifications, who may be unemployed, and thereafter the Individual Employer may employ Temporary Bottlers. The Individual Employer shall have full right of selection among said employees.

(3) The Local Union shall next dispatch applicants who may be registered for employment under Section "5(d)" hereof, provided, however, that in dispatching such applicants those with the most experience in the work in the State of California shall be dispatched first and those with the least experience in such work in the State of California shall be dispatched last, and thereafter those with the most experience in the work regardless of where acquired shall be dispatched first and those with the least experience in the work last, and thereafter those with no experience in the work shall be dispatched in accordance with the date the application was filed, those with the earliest date being dispatched first. The Individual Employer shall have full right of selection among said employees dispatched.

(4) The order of dispatch of permanent employees and of temporary employees and of new employees within classifications as provided in paragraph (c)(2) hereof shall be on the basis of the length of service in the industry in California.

(5) In the event an employee is dispatched pursuant to subsection "(c) (1)" hereof and he does not report for work within forty-eight (48) hours, he shall lose his seniority rights in the individual establishment to which he was dispatched, unless such failure is excused under Section "7(a), (b) or (d)" hereof.



(6) The seniority privileges protected by subsection "(c) (1) and (2)" hereof may be exercised only if such vacancy is to be filled for thirty-seven and one-half (37½) straight-time hours (30 hours in the case of Bottlers) or more and if the person with seniority reports for such work within forty-eight (48) hours of the existence of the vacancy.

(d) The Local Union shall maintain appropriate registration facilities for applicants for employment to make themselves available for job opportunities. The Local Unions and each of them will conduct such registration facilities without discrimination either in favor of or against such applicants by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union. Such dispatches will not be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements. Each Local Union with jurisdiction shall accept applications for employment in the various classifications as follows:

Brewers	February through March
Bottlers, Shipping and Receiving	
Clerks and Checkers	April through June
Drivers, Helpers and	
Servicers	May through June

Each application shall expire on the day preceding the first day for the receipt of such application in the following year.

(e) The Local Unions and each of them in carrying out the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch of prospective employees will not discriminate either

in favor of or against such prospective employees by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union, nor shall the carrying out of the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch of prospective employees be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions or any other aspect or obligation of union membership, policies or requirements, except to the extent of enforcing Section 3 hereof.

(f) Each Local Union and each Individual Employer will post at all employment offices and at all places in any establishment where notices to employees or applicants for employment are customarily posted a copy of this Agreement.

(g) It is agreed that the matter of referring persons for employment under this agreement and operating the employment offices for such referrals is not necessarily a management or union function, but by contract may be made a union responsibility. By this contract it is made a responsibility of the union and the Local Unions in carrying out the seniority and employment rights provided in this Agreement.

The respective Local Unions and the Teamster Brewery & Soft Drink Workers Joint Board of California, agree that they will in every respect exercise the responsibility of referring workers to employment and operating employment offices therefor in accordance with law. It is distinctly understood and agreed that neither the employer nor any Individual Employer is to have or may have any right, power, voice or control over such employment offices or the operation thereof,

and that neither the Teamster Brewery & Soft Drink Workers Joint Board of California, nor any Local Union acts as the agent or representative of the employer in the operation of such employment offices. By reason of the fact that the union and the Local Unions have obtained such control thereof through regular processes of collective bargaining, it is agreed that the Union and the Local Union shall be solely responsible for their operation to all persons, agencies and tribunals, subject to the employer's right to suggest, initiate or use procedures outside this Agreement in which any alleged abuse of this function may be reviewed by others having jurisdiction.

(h) This subsection shall apply only to an Individual Employer when he has five (5) or more persons performing work covered by this Agreement. The Individual Employer will notify the employment office of the Local Union with jurisdiction by 12:00 Noon Thursday of each week of the names of brewers, bottlers, checkers or shipping and receiving clerks to be laid off at the end of the work week, and the number of such employees to be hired at the start of the work week next following. The Local Union will notify the Individual Employer the following day not later than 12:00 Noon of the number of such employees to be dispatched for employment on the following Monday to displace new Employees and/or temporary employees, and the names of such employees the Local Union was able to contact and dispatch up to that time. The above Provisions will not apply when the failure to give notice by the time specified was due to equipment breakdown, acts of God, or other reasons beyond the control of the party.

*Section 6. (a)* No employee shall be discriminated against for activity in or on behalf of the Union, but \* \* \*

**APPENDIX**

Supreme Court, U. S.

**FILED**

**JUL 16 1979**

**MICHAEL RODAK, JR., CLERK**

**IN THE**  
**Supreme Court of the United States**

October Term, 1979  
No. 78-1548

**CALIFORNIA BREWERS ASSOCIATION, et al.,**

*Petitioners,*

**vs.**

**ABRAM BRYANT,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.**

**PETITION FOR CERTIORARI FILED APRIL 11, 1979**  
**CERTIORARI GRANTED JUNE 4, 1979.**

## SUBJECT INDEX

	Page
Opinions Below .....	1
Docket Entries From Record on Appeal From Northern District of California to Ninth Circuit (R. 533-535) .....	2
Docket Entries From Ninth Circuit .....	5
Second Amended Complaint (Employment Discrim- ination and Unfair Representation) .....	9
Relevant Provisions of the Collective Bargaining Agreement .....	25
Minute Order of District Court of Northern District of California .....	43
Order Granting Defendants' Motions to Dismiss Pursuant to Federal Rules of Civil Procedure ....	43
Judgment .....	45



IN THE  
**Supreme Court of the United States**

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*Petitioners,*

vs.

ABRAM BRYANT,

*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

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**APPENDIX**

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**Opinions Below.**

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 585 F.2d 421, unofficially reported at 18 F.E.P. Cas. 826 and is set forth in Appendix A of the Petition for Writ of Certiorari, filed April 11, 1979. No opinion was rendered by the District Court for the Northern District of California.

**Docket Entries From Record on Appeal From Northern  
District of California to Ninth Circuit (R. 533-535).**

(Case Title Omitted in Printing)

1973

Oct 19 1. Filed Complaint . . . iss summons.

Oct 31 2. Filed Order for Service other than by USM.

Nov 20 3. Filed Stip Ext'g time to 12/20/73 for Deft Miller to respond.

Nov 21 4. Filed Stip Ext'g time to 12/19/73 for Deft FALSTAFF to respond to complt.

Nov 26 5. Filed Stip re 30 day ext to time to respond to complaint.

Nov 26 6. Filed Stip that Deft TEAMSTER's Local 856 may have to 12/20/73 to respond to complt.

Dec 11 7. Filed summons on ret, exec as to PAHLOW, BURTON, ANHEUSER, & PABST & unexec as to GORDON BOURNE.

Dec 17 8. Filed US Marshal's instructions service record on ret, exec.

Dec 20 9. Filed Deft FALSTAFF's Ans to Complaint.

10. Filed Deft's not of Mo to Dism for lack of Jurisdiction & Mo.; set 1/11/74 @ 11am.

Dec 20 11. Filed Joinder of MILLER BREWING in Mo to Dism for lack of Juris.

Dec 26 12. Filed Defts not of mo & mo to Dism; set for 1/11/74 @ 11am.

Dec 27 13. Filed Substn of attys for cert Defts.

1974

Jan 2 14. Filed Deft GENERAL BREWING, etc Mo to Dism; set for 2/1/74 @ 11am.

Jan 8 15. Filed Stip for ext of time to resp as to TEAMSTERS LOCAL 856. time extd to 1/21/74.

Jan 11 Iss alias summons.

16. Filed Stip & ord contg hrg on mo to Dism to 2/1/74 @ 11am. LHB

Jan 15 17. Filed Stip extg time to 1-15-74 for Deft Local 888 to resp. LHB

Jan 15 18. Filed Deft Local 888's not of mo & Mo to dism; set for 2-8-74 @ 11.

Feb 1 19. Filed Ord contg hrg on mo to Dism. LHB (Hrg contd to 2/22/74 @ 11am. LHB)

20. Filed Stip & Ord ocntg hrg on Defts' mo to Dism to 2/22/74 @ 11am.

1974

Feb 4 21. Filed Summons on ret, exec.

Feb 8 22. Filed Stip extg time to 3/11/74 for Defts SALES DRIVERS, DAIRY EMPL & BEER DRIVERS UNION. LHB

Feb 12 23. Filed Pltff's Memo of Pts & Auths in .Esponse to Deft's mos to Dism.

Feb 15 24. Filed Amended Complaint . . . no process.

Feb 25 25. Filed Deft FALSTAFF's 1st interrogs & 1st req for prod of docs.

Mar 4 26. Filed Deft's Suppl Pts & Auths.

Mar 4 27. Filed Deft MILLER's Suppl Pts & Auths in supp of Mo to Dism.

Mar 5 28. Filed Stip to Amend Complt.

29. Filed Fur Memo of Pts & Auths in supp of Mo to dism of Defts GENERAL.

Mar 11 30. Filed Stip & Ord contg hrg to 4/5/74 @ 11am for mo to Dism.

Mar 11 31. Filed Stip & Ord contg time to resp to 30 days from decision on mo to Dism. LHB.

Mar 18 32. Filed Pltff's fur memo of Pts & Auths in response to Defts' mos to

Mar 18 33. Filed Stip extg time to 4/15/74 for Defts to respond. & Ord. LHB

Mar 20 34. Filed Stip for ext of time to 4/25/74 for Pltf to resp to Defts i

Apr 1 35. Filed Deft MILLER's final response in supp of Mo to Dism.

Apr 1 36. Filed Final Memo of Pts & Auths in supp of Mo to Dism.

Apr 5 37. Filed Pltff's Ans to Deft FALSTAFF's Interrogs 35-38.

Apr 5 ORD: Deft's mo to Dism cont'd to 5/10/74 @ 2pm. LHB

Apr 5 38. Filed Affdvt of James Wolpman.

Apr 12 39. Filed Pltff's mo for leave to file suppl Pleading.

Apr 11 40. Filed Reporter's Transcript of Apr 5, 1974.

Apr 19 41. Filed Stip & Ord extg time to ans until 10 days after hrg on pending mos to Dism. LHB (as to TEAMSTERS LOCAL 856)

42. Filed Stip & Ord cont'g time of Deft LOCAL 856 to ans to 5/10/74.

Apr 29 43. Filed Pltff's response to Deft FALSTAFF'S 1st interrogs.

Apr 30 44. Filed Deft MILLER BREWING's oppos to Pltff's mo for leave to file pleading.

- 1974
- Apr 30 45. Filed Oppos to Pltff's Mo to supplement Complaint.
- May 2 46. Filed Mo of EEOC to participate as Amicus Curiae.
- May 7 47. Filed Pltff's Memo in supp of mo to supplement complaint.
- May 8 48. Filed Pltf's response to Deft Falstaff's first request for production of documents.
- May 9 49. Filed Defts' Oppos to Participation of EEOC as Amicus Curiae & Proposed Ord.
- May 10 50. Filed Affdvt in supp of iss of Right to sue notice prior to 180 day.  
ORD: Hrg cont'd to 5/13/74 @ 1:30, Mo for Amicus Curiae by EEOC, denied Mo to file 2nd amended complaint . . . granted.
- May 22 51. Filed 2nd Amended Complaint.
- June 7 52. Filed Brief for the EEOC in supp of Pltff's Mo for leave to Suppl complaint & in oppos to Deft's Mo to Dism. (amicus curiae).
- June 7 53. Filed Defts General Brewing, etc., mo to Dism 2nd amended complt.
- Jul 2 54. Filed Stip. & Order that all proceedings in the above matter will be stayed to Sept. 11-74 (LHB)
- Aug 16 55. Filed Substn of counsel for SCHLITZ.
- Aug 26 56. Filed Substn of attys for Deft Pabst.
- Aug 29 57. Filed Deft Schlitz's not of substn of counsel.
- Sep 9 58. Filed deft's add'l pts and author. in supp. of mo to dismiss pltf's sec amended complt.
- Sep 10 59. Filed Joinder of deft Miller Brewing Co. in mo to dismiss. pltf's sec. amended complt.
- Sep 11 60. Filed Affidavits of Attorneys James H. Wolpman & Edward N. Simon in showing efforts of Parties to conciliate.
- Sep 11 Civil Minute Order Motions to dismiss, Complaint is dismissed as to all Deft's Mr. Carr to prepare Order (LHB)
- Oct 17 61. Filed ORD. defts' mo to dis—GRANTED. LHB
- Oct 18 62. Entered JUDGT: pltf to take nothing by his amend. & suppl complt and that action be dismissed w/prejudice LHB  
Mailed not of entry of judgt
- Nov 14 63. Filed pltf's Not of appeal of Judgt filed 10-18-74 not of appeal mailed to counsel & 9th CCA.
64. Filed pltf's \$250 Bond for costs on appeal.

- 1974
- Nov 18 65. Filed orig of Reporter's Transcript of 9-11-74.
- Nov 21 66. Filed Designation of Record on Appeal by appellant & appellee.
67. Filed Ord for Prepar of Reporter's transcripts.
- Dec 2 68. Filed Ord for Prepar of Reporter's Transcripts by appellees Calif. B ass., General Brewing Co., Theodore Hamm Col & Anheuser-Busch Inc.
- Dec 23 Rec'd Reporter's Transcript from Ct. Reporter (proceeds of 4-5-74) with proceeds of 9-11-74 added) orig & 1 copy.
- Dec 26 MADE, MAILED, RECORD ON APPEAL TO 9TH CCA.

**Docket Entries From Ninth Circuit.**  
(Case Title Omitted in Printing)

- 1975
- Jan 30 FILED ORIG & 3 MOTION OF APPELLEE PABST BREWING COMPANY TO DISMISS APPEAL UNDER RULE 12-C FRAP (To McAvoy) (12C)
- Jan 30 DOCKETED CAUSE & ENTD APPEARANCES OF COUNSEL.  
CAUSE DOCKETED UNDER RULE 12(c) F.R.A.P. APPELLANT CANNOT RESPOND UNLESS DOCKET FEE IS PAID OR LEAVE TO APPEAL IN FORMA PAUPERIS IS GRANTED.
- Feb 3 DOCKET FEE PAID. gb Clerk's Fee (Appellant) \$50.
- Feb 5 Filed aples' (ANHEUSER-BUSCH, INC., et al.) motion to dismiss appeal. To: McAvoy gb
- Feb 6 Filed aplt's motion to docket appeal out of time and for nunc pro tunc order therefore, and response to motion to dismiss appeal to (McAvoy). jr 2/6/75
- Feb 12 Filed joinder of aple (Miller Brewing Co) motion of certain aples to dismiss appeal to McAvoy. jr 2/6/75
- Feb 12 Filed, as of 2/11/75, aple's (Jos. Schlitz Brewing Co) motion to dismiss appeal to (McAvoy). jr 2/7/75
- Feb 18 Filed aplts response to certain further motions to dismiss appeal to (McAvoy). jr 2/15/75
- Feb 20 Filed order (W & S) the aples motion to dismiss the appeal is denied jr



1975  
Feb 27 REC'D ON 12-30-74, LATE CERT. TRANSC  
RECORD ON APPEAL IN FOUR VOLUMES:  
VOLS. I-III, PLEADINGS, ORIG. ONLY; VOL  
IV REPORTER'S TRANSCRIPT, ORIG. & ONE  
COPY. ONE ENVELOPE OF EXHIBITS FILED  
IN LPS. \*\*\*\*\* —acb—  
Mar 3 Filed aplt's. motion for leave to file late record.  
To: "C" ec  
Mar 6 Filed order (K) granting aplt leave to file late  
record. jr  
Mar 6 Record Filed. —acb—  
Appellant's brief due to be filed on April 21, 1975  
pursuant to Order of this Court filed March 6,  
1975. —acb—  
Mar 11 FILED TWO ADDITIONAL COPIES OF THE  
RECORD, VOLS. I, II & III, PLEADINGS.  
—acb— Clerk's fee (Appellant) \$15.  
Apr 21 Filed 25 Aplt's Briefs. 4-21-75 ec  
May 19 Received letter of Appellee's dated May 15, 1975  
advising The office of Brundage, Beeson, Reich,  
Pappy & Hackler is counsel for appellees Bottlers  
Union Local 896 and Drivers Union Local 203. By  
this letter they join in the briefs to filed by the  
other appellees. sj  
May 21 Filed aple's (Teamsters Local 856) motion for ext  
of time to file briefs; to "C" ec  
May 23 Filed appellees' motion for enlargement of time  
within which to file brief; affidavit of Michael Ryan  
in support thereof. To "C"  
May 28 Filed orig & 5 Appellee's motion for ext of time  
to file (Beer drivers brief (to Chambers) 5-23-75  
sj  
May 29 Filed order (C) granting aple's (Gen. Brewing Co,  
et al.) ext for filing brief to July 28, 1975. —ec—  
May 29 Filed order (C) granting aple (Teamsters Union  
Local 856) ext for filing brief. Brief due 21 days  
from date (May 28) —ec—  
Jun 10 Filed appellee's motion (Teamsters Union Local  
856) for ext of time for filing brief. To "C"  
—ec—  
Jun 13 Filed as of June 9, 1975 order (C) Brief of Ap-  
pellee due 21 days from May 28, 1975. BRIEF  
DUE June 25, 1975) sj  
Jun 13 Filed order (C) extding time to July 28th in which  
to file brief of appellee Teamsters Union Local  
856. rh

1975  
Jul 28 Filed 25 Aplee's Briefs (Cal. Brewers Assoc., et  
al.) 7/25/75 —dmf—  
Jul 28 Filed 25 Aplee's Briefs (Teamsters Union Local  
856 and 893) 7/28/75 —dmf—  
Jul 29 Filed 25 Separate Aplee's Briefs (Pabst Brewing  
Co., Miller Brewing Co., and Jos. Schlitz Brewing  
Co.) 7/28/75 —dmf—  
Jul 30 Filed Pltf-aplt's Motion for Enlargement of Time  
Within Which to File Reply Brief. (to "C")  
—acb—  
Aug 1 Filed order (C) granting aplt ext for filing reply  
brief to Sept. 10/75. ec  
Sept 2 Filed stipulations for enlargement of time within  
which to file aplt's reply brief. To "C" ec  
Sept 8 Filed order (C) granting Aplt an ext of time to file  
his reply brief to and including September 10,  
1975. —dmf—  
Sept 10 Filed 25 Aplt's Reply Briefs (9/10/75) —dmf—  
Nov 5 Filed appellant's motion for leave to file appendix.  
to "C" w/copy of appendix. ec  
Nov 5, Rec'd 10 Appendixes to aplt's brief. (11/4/75)  
—dmf—  
Nov 10 Filed order (C) granting aplt leave to file an ap-  
pendix to his brief. ec  
Nov 10 Filed 10 Appendixes to Aplt's Brief (11/4/75)  
—dmf—  
1977  
May 4 Rec'd from aple's letter dtd. May 3, 1977, re add'l  
citations. CALENDARED (panel) ec  
May 5 Rec'd from aplt letter dtd. May 4, 1977, re add'l  
citations with copies of the Report of the Civil  
Rights Commission. May 12, 1977 sf panel ec  
May 12 ARGUED & SUBMITTED TO: HUFSTEDLER,  
TRASK, CJJ & HARRY PREGERSON, DJ. gb  
Jun 8 Filed aple's supplemental authorities and motion for  
leave to file supp. brief. (panel) ec  
Jun 9 Filed aple's amended certificate of service to motion  
for leave to file supp. brief. ec  
Jun 9 Rec'd from aple (Miller Brewing Co.) letter dtd.  
Jun 7, 1977, re US Supreme Ct. decision in Int'l  
Bro. of Teamsters v. U.S. (panel) ec  
Jun 15 Rec'd from aplt letter dtd. Jun 14, 1977, re aple's  
letter of Jun 7, 1977. (panel) ec  
Jun 15 Filed Aplt's response to motion of certain aple's for  
leave to filed supplemental brief. (panel) mc

1977  
 Jun 27 Filed order (H & T, CJJ & PREGERSON, DJ) Aples' motion for leave to file a supplemental brief is granted. Said supplemental brief shall be filed no later than 10 days after the filing of this order. —fn—  
 Jul 5 Filed 4 Aples' Supplemental Briefs (California Brewers Assoc., et al.) 6/30/77 —dmf— (panel)  
 Jul 7 Filed aplt's motion for leave to file supplemental memorandum of points & authorities. (panel) ec  
 Jul 7 Rec'd aplt's supplemental memorandum of points & autho. (panel) ec  
 May 17 Filed as of 5/15/78, Aple substitution of attorneys. 5/12 —vt—  
 1978  
 Nov 13 As of Nov. 3, ORDERED OPINION (PREGERSON) TRASK DISSENTING; FILED & JUDG TO BE FILED & ENTD.  
 Nov 13 As of Nov. 3, Filed opinion—Reversed and remanded for further proceedings consistent with the views herein expressed.  
 Nov 13 As of Nov. 3, Filed & Entd Judgment. —fn—  
 Nov 28 Filed as of 11/17/78, Certain Aples' Motion for Extension Within Which to File Petition for Rehearing/Rehearing En Banc. (to panel) nw  
 Dec 1 Filed, as of Nov. 16, Apl't's cost bill. —db—  
 Dec 6 Filed, as of of Nov. 14, order (H) IT IS HEREBY ORDERED that the dfds-aples California Brewers Association; Theo. Hamm Co.; Anheuser-Busch, Inc.; General Brewing Corp; Falstaff Brewing Corp.; Miller Brewing Co.; Joseph Schlitz Brewing Co.; and Pabst Brewing Co. may have up to and including Dec. 4, 1978 within which to file a petition for rehearing and/or a petition for rehearing en banc. —fn—  
 Dec 7 Filed Order as of 12/4, (in LA) (Hufstedler) extending time for filing aples' Petition for Rehearing & suggestion for rehearing en banc to Dec 14, 1978. ec  
 Dec 7 Filed as of 12/4, orig & 24 Aples' Petition for Rehearing and Suggestion for Hearing en banc. 12/1 active judges, panel ec  
 Dec 11 Filed, as of Dec. 5, order (H) Aples' motion for an ext of time within which to file a petition for rehearing and a suggestion for rehearing en banc is granted to and including Dec. 14, 1978. —fn—

1979  
 Jan 17 Filed, as of Jan. 11, order (H & T, CJJ & PREGERSON, DJ) The petition for rehearing is denied and the suggestion for a hearing en banc is rejected. —fn—  
 Jan 1979 MANDATE ISSUED  
 Feb 2 Returned to D.C. Vols 1-2, Pleadings, Originals, Vol 2, R.T's, 1 copy, plus 1 ENVELOPE OF EXHIBITS mm  
 Apr 16 Received SC notice of filing petition for certiorari on 4/11/79, assigned SC#78-1548. pn  
 Jun 11 Filed certified copy of SC order of 6/4/79, granting certiorari. pn (copies to panel)

**Second Amended Complaint  
 (Employment Discrimination and  
 Unfair Representation)**

In the United States District Court, Northern District  
 of California.

Abram Bryant, individually and on behalf of all others similarly situated, Plaintiff, vs. California Brewers Association; Miller Brewing Company; Joseph Schlitz Brewing Company; Anheuser-Busch, Incorporated; Pabst Brewing Company; Theodore Hamm Company; General Brewing Company; Falstaff Brewing Corporation; Teamster Brewery and Soft Drink Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Local Union 856 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Salesdrivers and Dairy Employees Union Local 166 in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs,



Warehousemen and Helpers of America; Bottlers Union Local 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Beer Drivers and Salesmen's Union Local 888 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Drivers Union Local 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Salesdrivers, Helpers, and Dairy Employees Union Local 683 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Defendants. Civil No. C-73-1866 LHB.

1. Plaintiff hereby amends his original complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Paragraphs where additions occur are preceded by an asterisk (\*).

2. Plaintiff, individually and on behalf of all other persons similarly situated, seeks redress for wrongfully being prevented from achieving the status of a permanent employee in the brewery industry.

#### JURISDICTION

\*3. This action arises under the provisions of Title VI of the Acts of Congress known as the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., and under the Civil Rights Act of 1866, 42 U.S.C. §1981. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. §2000e(5)(f) and 28 U.S.C. §1343(4) to redress deprivation of rights secured by 42 U.S.C. §§2000e et seq., providing for mandatory injunctive and other relief against discrimination in employment based on race, religion, sex or national origin, and by 42 U.S.C. §1981, providing for the equal rights of all persons in the United States. The unfair repre-

sentation action arises under 29 U.S.C. §§159(a) and 185(a).

\*4. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1337, 1343(4), 2201, 2202, 29 U.S.C. §185(a), 42 U.S.C. §1988, and Rule 57 of the Federal Rules of Civil Procedure.

#### PLAINTIFF

5. Plaintiff Abram Bryant is a Black male citizen of the United States and a resident of the City of San Jose, County of Santa Clara, State of California. At all times relevant hereto, Plaintiff was employed as a temporary employee by Defendant Falstaff in San Jose, California, or in San Francisco, California, and was a member in good standing of Freight Checker Clerical Employees and Helpers Union Local 856 (hereafter Local 856) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (formerly Brewers Union Local 893 (hereafter Local 893) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.)

#### CLASS

\*6. The named Plaintiff brings this action on his own behalf and pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated: The members of the class similarly situated are all Blacks who have or will seek referral or employment from defendant employers and unions or who have or will be employed at any of the breweries of defendant employers covered now or then by the collective bargaining agreement attached as Exhibit A to the original complaint, including all preceding and succeeding agreements there-



to. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative party will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

#### DEFENDANTS

\*7. Defendant California Brewers Association (hereafter the Association) is a California corporation which represents a group of breweries doing business in the State of California in regards to labor-management relations and other matters. At all times relevant herein it was acting as the agent of and on behalf of Defendant Falstaff and the other defendant employers in negotiating and maintaining the illegal and discriminatory seniority agreements described herein. Defendant Miller Brewing Company, a Wisconsin corporation doing business in California, Defendant Joseph Schlitz Brewing Company, a Wisconsin corporation doing business in California, Anheuser-Busch, Incorporated, a Missouri corporation doing business in California, Pabst Brewing Company, a Delaware corporation doing business in California, Theodore Hamm Company, a Minnesota corporation doing business in California, General Brewing Company, a California corporation, and Falstaff Brewing Corporation (hereafter Falstaff), a Delaware corporation doing business in California are all members of the Association. Each

of the above named defendants is an employer within the meaning of 29 U.S.C. §152(2) and also within the meaning of 42 U.S.C. §§2000e-2(b) in that the company is engaged in an industry affecting commerce and employs at least twenty-five (25) persons.

8. Defendant Falstaff operated a plant where Plaintiff worked employing between 100 and 150 employees in the City of San Jose, County of Santa Clara, State of California, until the winter of 1972-73. That winter Falstaff transferred its workers to its plant in the City and County of San Francisco, State of California.

\*9. Defendant Teamster Brewery and ~~Soft Drink~~ Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter Joint Board) is an unincorporated association and a labor organization within the meaning of 29 U.S.C. §152(5) and also within the meaning of 42 U.S.C. §§2000e-2(d) in that the Joint Board is engaged in an industry affecting commerce and exists, whole or in part, for the purpose of dealing with the employers concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the various companies located in various cities throughout the state of California, including employees of Defendant Falstaff's facilities in and around the City and County of San Francisco and the City of San Jose, County of Santa Clara, and in the State of California. The Joint Board has at least twenty-five (25) members. At all times relevant herein it was acting as the agent of and on behalf of Defendant Local 856 and its predecessor Local 893 and the other defendant locals

herein in negotiating and maintaining the illegal and discriminatory seniority and referral provisions described herein.

10. Defendant Local 856 in itself and as successor to former Local 893 is an unincorporated association and a labor organization within the meaning of 29 U.S.C. §152(5) and also within the meaning of 42 U.S.C. §§2000e-2(d) in that Local 856 and former Local 893 (which recently merged with Local 856) are both unincorporated associations and labor organizations within the meaning of 29 U.S.C. 152(5) and also within the meaning of 42 U.S.C. §§2000e-2(d) in that both are or were engaged in an industry affecting commerce and exist, whole or in part, for the purpose of dealing with the employers concerning grievances, labor disputes, wages, rates of pay, hours and other terms or conditions of employment of the various companies located in various cities throughout the state of California, including employees of Defendant Falstaff's facilities in and around the City and County of San Francisco and the City of San Jose, County of Santa Clara, and in the State of California. Local 856 has at least twenty-five (25) members.

\*11. Defendant Salesdrivers, Helpers, and Dairy Employees Union Local 166 (hereafter Local 166) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is successor to former Local 893 in the southern counties of the state of California. When Local 893 was dissolved, the northern counties of the local were merged into Local 856 and the southern counties into Local 166. We therefore include Local 166 not as a new defendant but as successor to former Local 893. Defendants Local

893, Local 166, Bottlers Union Local 896 (hereafter Local 896) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Beer Drivers and Salesmen's Union Local 888 (hereafter Local 888) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Union Local 203 (hereafter Local 203) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Salesdrivers, Helpers and Dairy Employees Union Local 683 (hereafter Local 683) of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are all members of the Joint Board (Local 893 was formerly a member before the merger with Local 856 and Local 166) and are all unincorporated associations and labor organizations individually within the meaning of 29 U.S.C. 152(5) and also within the meaning of 42 U.S.C. §§2000e-2(d) in that they are all engaged in an industry affecting commerce and exist, whole or in part, for the purpose of dealing with the employers concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the various companies located in the various cities throughout the state of California. Each local has at least twenty-five (25) members.

\*11a. All of the defendants herein are part of a single multi-employer bargaining unit and are covered by a single collective bargaining contract [Exhibit A attached to the original complaint] which creates interdependent and reciprocal obligations among all of the signatory parties. As such all are indispensable to the granting of effective relief and to the prevention of a multiplicity of actions.



### FACTUAL ALLEGATIONS

12. In the brewery industry in the San Francisco Bay Area there is only one (1) Black person employed in production and he is not a permanent employee. Before Plaintiff was first hired on May 1, 1968, upon Plaintiff's information and belief, there was only one Black who had ever been hired as a brewer and he left after working one (1) week.

\*13. In past years, going back as far as their inception, the defendant employers have discriminated against blacks both in hiring and employment. The defendant unions have likewise discriminated in the referral of Black applicants from the hiring halls they operate and have acted in concert and collusion with defendant employers in discriminating against Blacks in hiring and employment.

\*14. The vehicles for the perpetuation of this invidious discrimination are the seniority and referral provisions of the collective bargaining agreement, which were negotiated a number of years ago. [See Exhibit A to the original complaint, Sections Four (4) and Five (5)]. These provisions have been negotiated and maintained in the collective bargaining agreement by the defendant employers and unions acting in concert with each other and through the California Brewers Association and the Joint Board as their agents. All defendant employers and unions have acted to enforce these illegal provisions and, in particular, the Sections 4(a)(1) and 4(5)(a) dealing with permanent status.

\*15. Given the circumstances which have existed in the brewery industry in California, these seniority and referral provisions have operated to prevent plaintiff and the members of his class from achieving the rights

and benefits accorded permanent employees or even from having a reasonable opportunity of achieving those rights and benefits.

\*16. As a result, permanent status in the brewery industry has almost exclusively been reserved to White workers, and Blacks have been forever precluded from achieving permanent status.

17. Plaintiff Abram Bryant was employed as a temporary brewer for Falstaff off and on for the last five (5) years, beginning May 1, 1968.

18. From June, 1968, until September 4, 1973, Plaintiff was a member in good standing of Local 856 and its predecessor Local 893.

19. Under the present collective bargaining agreement, there are a number of benefits accorded only to those who hold permanent status. Some of these are actually deducted from the earnings of all employees, temporary or permanent. An employee will never receive these benefits unless he is accorded permanent status.

20. When Plaintiff was hired there were no Black workers in the plant at that time. Since that time four (4) or five (5) Black employees have been hired but none were granted permanent status and all have since left Falstaff.

21. Some White employees who have worked forty-five (45) weeks in two (2) calendar years have been granted permanent status whereas Plaintiff in similar circumstances has been refused this status.

\*22. Upon Plaintiff's information and belief, the kind of conditions as described above are the same for Black employees who are or were employed by



all the breweries named as Defendants in this complaint. Furthermore, there were very few referrals of Black people to brewery jobs.

22a. After the filing of the original complaint herein, Plaintiff was referred by Defendant Local 856, of which he is presently a member in good standing, to work at the San Francisco facility of the Defendant Theodore Hamm Company, where he is presently employed. Under the terms of the seniority and referral provisions of the collective bargaining agreement herein he should have been referred out by Defendant Local 856 and employed by Defendant Theodore Hamm Company much earlier than he was; instead white workers with inferior seniority and referral rights were referred out and hired in his place. By such actions defendants Local 856 and Theodore Hamm Company discriminated against Plaintiff in violation of the provisions of 42 U.S.C. §§1981 and 2000e *et seq.* In addition, said defendants breached their obligations to him under 29 U.S.C. §§159(a) & 185(a); and resort to the contractual grievance procedure for such breach would be futile for the reasons alleged in Paragraph 27a of the Amended Complaint.

#### FIRST CLAIM FOR RELIEF

\*23. As a direct result of said racial discrimination, perpetuated by the seniority and referral provisions of his collective bargaining agreement, Plaintiff, and each and every member of his class have been deprived of the benefits which are afforded a permanent employee. The aforesaid seniority and referral provisions in the contract, particularly the clauses cited above, have had the result of perpetuating racial discrimination in violation of the provisions of Title VII of the Acts

of Congress, 42 U.S.C. §§2000e *et seq.* and 42 U.S.C. §1981.

#### SECOND CLAIM FOR RELIEF

\*24. Defendant Unions and Joint Board, as parties to the collective bargaining agreement and as part of the single multi-employer bargaining unit created thereby, acting wrongfully, arbitrarily and in bad faith failed fairly to represent Plaintiff and each and every member of his class by negotiating a contract containing unreasonable privileges for some employees over others and by failing to secure or accord to Plaintiff and the members of his class the seniority and referral benefits to which they are entitled under 29 U.S.C. §§159(a) & 185(a) and 28 U.S.C. §§1337, 1338(a) & 2201-02.

#### EXHAUSTION OF ADMINISTRATIVE REMEDIES

\*25a. At the time of filing his charge before the Equal Employment Opportunity Commission (hereafter "EEOC"), Plaintiff was not represented by counsel and was ignorant of the relation of the other parties signatory to the agreement to the discrimination practiced against him. Moreover, he did tell the EEOC agent who interviewed him and actually wrote out the Charge, which is attached hereto as Exhibit "C" and incorporated herein, that he wanted to "sue the whole brewery industry". The agent assured him that by naming the Joint Board he was adequately protecting himself.

\*25b. Said written charge to the EEOC was filed by Plaintiff on April 18, 1973, within ninety (90) days of the occurrence [sic] of the acts of which he complained, alleging, under oath, denial by Defendants

Falstaff, Local 893 and Joint Board of Plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*; the charge was then submitted to the California Fair Employment Practices Commission.

26. On May 4, 1973, the Fair Employment Practice Commission indicated that it was not assuming jurisdiction and returned the charge to EEOC for investigation.

27. On July 23, 1973, Plaintiff was advised by EEOC that he was entitled to institute a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said letter. A copy of said letter is attached as Exhibit "B".

\*27a. Prior to taking any of the actions herein alleged Plaintiff had contacted the executive head of his local union concerning the denial of permanent status, thereby attempting to use the grievance procedure and affording his union the opportunity to act on his behalf. Said union representative rebuffed him saying that there was nothing he could do to change the contract and that was that. Any attempt to further resort to the contract grievance procedure or to any intra-union procedures would have been futile because of the position taken by the executive head of the union and because of Plaintiff's status as one of the few Black members of Local 893, a union controlled by white permanent employees.

27b. On March 25, 1974, Plaintiff filed charges of discrimination with the EEOC in San Francisco, California, against each of the named defendants. These charges are attached hereto and incorporated herein as Exhibit D. On March 27, 1974, and March 29, 1974, the EEOC issued right to sue notices. These

Notices are attached hereto and incorporated herein as Exhibits E, F, G, H and I. In addition, the District Office Counsel for the San Francisco office of the EEOC wrote a letter which is attached hereto and incorporated herein as Exhibit J, explaining that the California Fair Employment Practices Commission now will not investigate class allegations and waived jurisdiction over these charges. The District Office Counsel further states that because of the enormous back log of cases in the EEOC Office, the Commission would not be able to investigate, conciliate, or file suit on the charges within 180 days. Plaintiff alleges, on information and belief, that the facts as contained in her letter are true and correct.

#### DAMAGES

28. There is between the parties an actual controversy as herein set forth. Plaintiff, and all others similarly situated, have no plain, adequate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction and damages is the only means of securing adequate relief. Plaintiff, and all others similarly situated, are now suffering and will continue to suffer irreparable injury from Defendants' policy, practice and custom of discriminating against qualified Blacks with respect to refusal to hire and allow them to become permanent employees.

29. As a direct result of the aforesaid conduct of Defendants, and each of them, Plaintiff was deprived of the benefit of a permanent position including benefits and promotions that reasonably would have been available to him. The exact amount of loss resulting from said deprivation is unknown and Plaintiff prays to amend his complaint to show such exact amount when it has been ascertained.



30. As a further direct and proximate result of the aforesaid conduct of Defendants, and each of them, each and every member of Plaintiff's class was deprived of gainful employment for a period of months. The exact amount of loss resulting to the members of Plaintiff's class from said deprivation is unknown to Plaintiff.

31. As a further direct and proximate result of the aforesaid conduct of Defendants, and each of them, Plaintiff was injured in his reputation and in his future earning capacity all to his damage in the sum of One Hundred Thousand Dollars (\$100,000).

32. As further direct and proximate result of the aforesaid conduct of Defendants, and each of them, each and every member of Plaintiff's class was injured in his reputation and in his future earning capacity all to his damage in the sum of One Hundred Thousand Dollars (\$100,000).

33. As a further direct and proximate result of the aforesaid conduct of Defendants, and each of them, Plaintiff suffered humiliation and gross emotional upset, pain and suffering, all to his damage in the sum of Fifty Thousand Dollars (\$50,000).

34. As a further direct and proximate result of the aforesaid conduct of Defendants, and each of them, each and every member of Plaintiff's class suffered humiliation and gross emotional upset, pain and suffering, all to his damage in the sum of Fifty Thousand Dollars (\$50,000).

35. Because of the willful, intentional and malicious acts of Defendants, and each of them, as hereinbefore alleged, Plaintiff claims punitive or exemplary damages

in the sum of One Hundred Fifty Thousand Dollars (\$150,000.)

36. Because of the willful, intentional and malicious acts of Defendants, and each of them, as hereinbefore alleged, each and every member of Plaintiff's class claims punitive or exemplary damages in the sum of One Hundred Fifty Thousand Dollars (\$150,000.)

#### PRAYER

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment for Plaintiff and each and every member of his class as follows:

1. Granting Plaintiff and each and every member of his class a declaratory judgment that Defendants' acts, and the acts of each of them, complained of herein, violated Plaintiff's and each and every member of his class' rights under Title VII of the Civil Rights Act of 1964.

\*2. Granting Plaintiff an injunction restraining Defendants, and each of them, their agents, employees, and all those acting in concert with them, from maintaining the practice of requiring an employee to work forty-five (45) consecutive weeks in one calendar year or anything similar to become a permanent employee, and from maintaining other provisions of the seniority and referral provisions of the collective bargaining agreement which perpetuate discrimination against Plaintiff and the members of his class; and further awarding Plaintiff and the members of his class seniority rights and benefits which will recompense them for the injury they have suffered from the conduct herein alleged.

\*3. Granting each and every member of Plaintiff's class damages against Defendant Unions and Joint



Board for failure to fairly represent each of them in the amount of \$10,000.

\*4. Granting Plaintiff damages against Defendant Unions and Joint Board ~~for~~ failure to fairly represent him in the amount of \$10,000.

5. Granting Plaintiff [sic] his actual damages, his loss of reputation and earning capacity, and his losses through humiliation and upset, according to proof.

6. Granting each and every member of Plaintiff's class his actual damages, his loss of reputation and earning capacity, and his loss through humiliation and upset, according to proof.

7. Granting Plaintiff and each and every member of his class, for punitive and exemplary damages, the sum of One Hundred Fifty Thousand Dollars (\$150,000) from and against Defendants, and each of them, jointly and severally.

8. Granting Plaintiff permanent status as an employee of Falstaff as of June 1, 1968.

9. Awarding Plaintiff his costs herein.

10. Awarding Plaintiff reasonable attorneys' fees.

11. Granting Plaintiff such other and further relief as to the Court seems just and proper.

Dated: May 15, 1974.

ROMINES, WOLPMAN, TOOBY, EICHNER, SORENSEN & CONSTANTINIDES

By /s/ James Wolpman  
JAMES WOLPMAN  
Attorneys for Plaintiff

[Certificates of Service and Exhibits Omitted]

[R. 446-472]

**Relevant Provisions of the Collective  
Bargaining Agreement.\***

**AGREEMENT**

This Agreement made and entered into this 1st day of June, 1970, by and between the TEAMSTER BREWERY & SOFT DRINK WORKERS JOINT BOARD OF CALIFORNIA (herein sometimes referred to as the "Joint Board" or "Union"), the CALIFORNIA BREWERS ASSOCIATION, and ASSOCIATIONS and INDIVIDUAL EMPLOYERS signatory hereto.

**GENERAL PROVISIONS**

Section 1. The term "Individual Employer" as used herein means each employer who is now a member of the California Brewers Association. Other associations of employers and others employers not members of such other associations or of the association named herein, may become signatory hereto by signing a counterpart hereof provided that in the case of such other associations no member of such other association or employer represented by such association for collective bargaining purposes is then engaged in a labor dispute with the Union or any of its constituent local unions and in the case of such other employers no such employer is then engaged in a labor dispute with the Union or any of its constituent local unions.

This Agreement covers the following counties of the State of California:

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\*The entire collective bargaining agreement had been originally attached as an exhibit to the Second Amended Complaint, and resubmitted in the Appendix to the Ninth Circuit.

Alameda	Sacramento
Contra Costa	San Bernardino
Fresno	San Diego
Imperial	San Francisco
Inyo	San Joaquin
Kern	San Luis Obispo
Kings	San Mateo
Los Angeles	Santa Barbara
Madera	Santa Clara
Marin	Santa Cruz
Mono	Solano
Monterey	Sonoma
Napa	Tulare
Orange	Ventura
Riverside	

Stanislaus and Yolo, except for those individual establishments therein of Individual Employers covered hereby which may be under contract with another labor organization covering employees performing all or any part of the work covered by this Agreement.

If the Union enters into an Agreement with a distributor or association of distributors covering employees employed in the Brewing Industry in California in the Counties above named and in the classifications covered by this Agreement, such employees' seniority in the Brewing Industry in California in the Counties above named shall be recognized hereunder in accordance with the provisions of Section 4 of this Agreement.

Section 2. (a) The word "EMPLOYEE" as used herein means those employees of the Individual Employers covered hereby who perform their services principally in the State of California and within the counties hereinabove listed and who are: \* \* \*

Section 4. (a) With respect to Brewers, Bottlers, Drivers and Shipping and Receiving Clerks and Checkers for the purposes of seniority only there shall be five classes of employees, as follows:

- Permanent employees
- Temporary employees (other than Bottlers)
- Temporary Bottlers
- Apprentices
- New employees

Subject to the provisions of Sections 4 (1) and 43. The term temporary employee includes a temporary bottler unless the reference expressly negates such an inclusion.

(1) A permanent employee (other than Bottlers) is any employee other than an apprentice who, subject to subsection "(a)(5)" following, has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in this State. Temporary Bottlers shall be entitled to the full rate and permanent status after they have worked 1600 hours in a calendar year. Hours worked since January 1, 1970 shall count for this purpose.

Time lost because of sickness or injury, leave of absence, or vacation shall not be counted as "employment under this Agreement" for the purposes of this section.

All employees, except apprentices, who are on the date of this Agreement qualified as permanent employees under the provisions of the brewers' distributors' agreement previously in effect with the Teamster Brewery & Soft Drink Workers Joint Board of California and those employees covered by this Agreement who

have qualified for a vacation based on employment in California as a brewer, bottler, driver or helper, or checker or shipping or receiving clerk under the provisions of a contract with another labor organization in the prior year for an employer covered hereby shall be considered permanent employees.

(2) A temporary employee (other than Bottlers) is any person other than a permanent employee or an apprentice who worked under this agreement or predecessor agreements in the preceding calendar year for at last sixty (60) working days, subject to subsection "(a)(6)", or who was a temporary employee when he entered the armed services and retains such status; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5(b) is not given the status of a temporary employee by such employment.

A temporary Bottler is any Bottler other than a permanent Bottler as set forth in Section 4(1).

(3) An apprentice is an employee whose employment is governed by the provisions of this Agreement applicable to apprentices. An apprentice upon completion of his apprenticeship period shall take the status of a permanent employee and his seniority as a permanent employee shall commence as of the date of his employment as an apprentice.

(4) A new employee is any employee who does not qualify as a permanent employee, a temporary employee or an apprentice; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5(b) is not given the status of a new employee by

such employment. On December 31 of each year, all new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months shall become temporary employees.

(5) A permanent employee who is not employed under this Agreement for any consecutive period of two (2) years shall thereupon lose his status as a permanent employee hereunder, provided, however, that the period of two years will be extended for any period of incapacity. A permanent employee who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A permanent employee who has been discharged by any Individual Employer in the exercise of his management function shall thereby lose all seniority with such Individual Employer. Such person may regain his status as a permanent employee by being re-employed subject to this Agreement within two (2) years from such quitting or discharge.

(6) A temporary employee who is not employed subject to this Agreement for a period of one (1) year shall thereupon lose his status as a temporary employee. A temporary employee or new employees or apprentice who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A temporary employee who has been discharged by an Individual Employer in the exercise of his management function shall thereby lose all seniority with such individual Employer. Employment



prior to such loss of status under this subsection shall not be counted thereafter in determining the seniority or status of such a person.

(7) A new employee who fails to qualify for transfer to temporary employee status at the end of a year shall lose his status as a new employee.

(b) A permanent employee who has been laid off and not discharged by an Individual Employer in the exercise of management's function may be dispatched—if such employee so desires—for work in any establishment of any Individual Employer in the local area of his last employment and shall have the right to replace—as of Monday—the temporary employee or new employee with the lowest plant seniority therein employed regardless of anything in this Agreement to the contrary. The Individual Employer need not employ such permanent employee unless he is competent to fill the position held by the temporary employee or new employee who is to be replaced.

(c) A seniority list for each of the five classifications of employees shall be maintained for each establishment of each Individual Employer. The last employee on the seniority list of the establishment who is working in the establishment shall be the first laid off, and the first employee on the seniority list of the establishment who is not working in the establishment shall be the first rehired. Each such seniority list shall be based on the following: Sections of the list:

(1) The first portion of the seniority list shall comprise the permanent employees other than Bottlers having seniority in the establishment arranged in descending order of their seniority.

(2) The second portion of the seniority list shall comprise the temporary employees other than Bottlers having seniority in the establishment, arranged in descending order of their seniority.

(3) The lowest portion of the seniority list shall comprise the new employees having seniority in the establishment arranged in descending order of their seniority.

(4) Permanent and Temporary Bottlers entitled to seniority shall be placed on a separate seniority list which shall follow the procedure set forth in subsections (c)(1) and (c)(2) above.

(5) A separate list shall be maintained for apprentices.

#### *Seniority Dates of Individual Employees*

(1) The plant seniority of each permanent employee shall date from the first day of his employment as a permanent employee or apprentice in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several permanent employees dates from the same day, their relative seniority as permanent employees shall be in accord with their length of service in the industry in California.

(2) The plant seniority of each temporary employee shall date from the first day of his employment as a temporary employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several temporary employees dates from the same day, their relative seniority as temporary employees shall be in accord with their length of service in the industry in California subject to (4) hereof.

(3) The plant seniority of each new employee shall date from the first day of his employment as a new employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several new employees dates from the same day, their relative seniority as new employees shall be in order of hire in accordance with 5(a)(3).

(4) On December 31 of each year, the names on the list of new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months, on that date shall be transferred, in the existing sequence to the end of the list of temporary employees.

(d) An employee having seniority in one establishment while working in another establishment and who leaves the other establishment while work is available to him there in order to maintain his seniority in the first establishment shall lose plant seniority in the other establishment. An employee who elects to remain at work at the other establishment shall lose plant seniority in the first establishment.

(e) In all cases in which a permanent employee accepts a transfer from one establishment of an Individual Employer to another establishment of such Individual Employer in the local area, such employee shall retain for a period of two years from the date of such transfer his plant seniority rights in the establishment from which he was transferred. He may, upon thirty (30) days' notice to the employer, within such two-year period, return to the individual establishment from which he was transferred and the Individual Em-

ployer may transfer such employee back to such establishment at any time within such period. In either case, his plant seniority rights therein shall be the same as if he had not accepted such transfer in the first place.

(f) Apprentices shall be subject to seniority only as between apprentices working for the same brewery establishment. Discharge by any Individual Employer in the exercise of his management function terminates all seniority rights of an apprentice.

(g) Any person employed without seniority shall gain no seniority if a person with seniority reports for such work within forty-eight (48) hours of his employment.

(h) The Individual Employer has the right to increase or reduce the number of employees at any time subject to the provisions of this Agreement.

(i) (1) Regardless of anything to the contrary in this contract contained, an Individual Employer cannot be compelled to re-employ any employee, permanent or temporary or new or applicant or apprentice, who has been previously discharged by such Individual Employer in the exercise of his management function, provided, however, that he may re-employ such employee if he so desires. If such Individual Employer does re-employ such discharged employee, such re-employed employee's plant seniority shall start from the date of such re-employment.

(2) Regardless of anything to the contrary in this Agreement, any permanent, temporary or new employee who is discharged for dishonesty shall lose his status and seniority, if any, as of the date of such discharge, and employment prior to such loss of status and senior-



ity shall not be counted thereafter for any purpose. Pilfering of cases or inducing bottlers or loaders to give drivers extra bottles shall be regarded as dishonesty and dealt with as above set forth. The furnishing of surety bonds against embezzlement shall be left to Individual Employer's discretion; provided, however, that said Individual Employer shall be required to pay the premium on said bond and provided further that said bond shall in no way be construed as affecting said employee's union obligation.

(j) A driver, helper or servicer covered by this contract who accepts a salesman, salesman-displayman, or displayman's job with his employer for whom he is at that time working in a classification covered by this Agreement shall, so long as he stays in the employ of the same employer at the same establishment, retain his seniority under this Agreement in such employer's establishment. If he is laid off or terminated (other than discharged for cause) from the salesman, salesman-displayman or displayman's job by such employer he may exercise such retained seniority rights provided he does so within thirty (30) days of such lay-off or termination. Should he leave the employ of such employer, he shall lose his seniority rights with such employer but shall retain his status in the industry subject to Sections 4(a)(5) and 4(a)(6) of this Agreement.

(k) Regardless of anything in this Agreement to the contrary, in the event that a permanent employee is laid off, he may register on the out-of-work list in any classification covered by this Agreement and shall be eligible to be dispatched upon the exhaustion of the temporary employees out-of-work list. In the

event a salesman, salesman-displayman or displayman with five (5) years seniority in the industry in such classification or classifications who is laid off or terminated (other than discharged for cause) from such salesman, salesman-displayman or displayman's job shall be eligible to be dispatched as a permanent driver hereunder. Such employee shall accrue no seniority if dispatched in a classification other than that in which he is a permanent employee and shall have no right to bump on such dispatch, although he shall maintain and accrue seniority as such permanent employee. The Individual Employer need not employ such permanent employee unless he is competent to perform the work when dispatched in a classification other than that in which he is a permanent employee.

Salesmen, Salesmen-displaymen and Displaymen who have been employed in the industry for sixty (60) days or more shall be considered permanent employees for the purposes of registering only.

(1) (I) A Temporary Bottler is any Bottler other than a permanent Bottler.

(2) After completion of the probationary period specified in Section 31, Temporary Bottlers shall have seniority for dispatch and layoff purposes only among Temporary Bottlers. After completion of such probationary period their seniority shall be retroactive to the first day of employment in that calendar year.

(3) Temporary Bottlers may not be employed in a previously established bumping area so long as a permanent Bottler is available for employment in such previously established bumping area.

(4) A Temporary Bottler shall lose his seniority if not employed under this Agreement for one (1)



year and for other reasons set forth in this Agreement providing for loss of seniority.

(5) (a) Temporary Bottlers shall work only in the classification in which dispatched. They shall receive vacation, holiday, overtime, shift differential fringes only. Pension contributions shall be made for Temporary Bottlers from the first compensable hour. Health and welfare contributions for Temporary Bottlers shall commence after the probationary period has expired. Temporary Bottlers shall be entitled to receive permanent Bottlers' pay after they have worked 3000 hours of employment under this Agreement in one classification in two consecutive calendar years as an employee of the brewing industry in this State. Hours worked since January 1, 1970 shall count for this purpose.

(b) If permanent Bottlers are available, temporary Bottlers shall work no overtime, unless a part of an entire crew.

(c) Temporary Bottlers shall be employed on a day to day basis.

*Section 5.* (a) The Individual Employer must secure all employees covered by this Agreement through the employment offices of the Local Union affiliated with the Teamster Brewery & Soft Drink Workers Joint Board of California, with jurisdiction.

With respect to Brewers, Bottlers, (Drivers) and Shipping and Receiving Clerks and Checkers for the duration of this agreement, satisfactory and competent men will be furnished within forty-eight (48) hours and in the event they cannot be or are not furnished, the Individual Employer may employ any person.

(b)(1) If the Individual Employer requests employees (except Bottlers) for work for less than thirty-

seven and one-half ( $37\frac{1}{2}$ ) straight-time hours the Local Union shall dispatch those employees readily available for dispatch and the Individual Employer may hire for such work any unemployed permanent, temporary employee, new employee or applicant for employment, without regard to seniority and such employee shall establish no seniority rights by reason of such employment for such work.

(2) If the Individual Employer requests Bottlers for work for less than thirty (30) straight time hours in a calendar week, the Local Union shall dispatch Temporary Bottlers who are registered for employment in the order of their experience in the industry and when the list of such persons is exhausted, in the order of their registration.

(c) In all other cases the Local Union shall dispatch and the Individual Employer shall hire as follows:

(1) In dispatching the Local Union shall first dispatch in accordance with the seniority provisions set out in Section "4" hereof in descending order of seniority, the employee with the highest seniority to be dispatched first.

(2) In the case of Brewers, Drivers, Shipping and Receiving Clerks and Checkers the Local Union shall next dispatch permanent employees registered in the established area who may be unemployed and thereafter temporary employees registered in the established area who may be unemployed and thereafter new employees who may be unemployed, subject to Section 43. In the case of Bottlers the Local Union shall next dispatch permanent Bottlers registered in the previously established bumping area who may be unemployed, and

thereafter permanent employees registered in the previously established bumping area in other classifications, who may be unemployed, and thereafter the Individual Employer may employ Temporary Bottlers. The Individual Employer shall have full right of selection among said employees.

(3) The Local Union shall next dispatch applicants who may be registered for employment under Section "5(d)" hereof, provided, however, that in dispatching such applicants those with the most experience in the work in the State of California shall be dispatched first and those with the least experience in such work in the State of California shall be dispatched last, and thereafter those with the most experience in the work regardless of where acquired shall be dispatched first and those with the least experience in the work last, and thereafter those with no experience in the work shall be dispatched in accordance with the date the application was filed, those with the earliest date being dispatched first. The Individual Employer shall have full right of selection among said employees dispatched.

(4) The order of dispatch of permanent employees and of temporary employees and of new employees within classifications as provided in paragraph (c)(2) hereof shall be on the basis of the length of service in the industry in California.

(5) In the event an employee is dispatched pursuant to subsection "(c)(1)" hereof and he does not report for work within forty-eight (48) hours, he shall lose his seniority rights in the individual establishment to which he was dispatched, unless such failure is excused under Section "7(a), (b) or (d)" hereof.

(6) The seniority privileges protected by subsection "(c) (1) and (2)" hereof may be exercised only if such vacancy is to be filled for thirty-seven and one-half (37½) straight-time hours (30 hours in the case of Bottlers) or more and if the person with seniority reports for such work within forty-eight (48) hours of the existence of the vacancy.

(d) The Local Union shall maintain appropriate registration facilities for applicants for employment to make themselves available for job opportunities. The Local Unions and each of them will conduct such registration facilities without discrimination either in favor of or against such applicants by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union. Such dispatches will not be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements. Each Local Union with jurisdiction shall accept applications for employment in the various classifications as follows:

Brewers	February through March
Bottlers, Shipping and Receiving	
Clerks and Checkers	April through June
Drivers, Helpers and	
Servicers	May through June

Each application shall expire on the day preceding the first day for the receipt of such application in the following year.

(e) The Local Unions and each of them in carrying out the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch



of prospective employees will not discriminate either in favor of or against such prospective employees by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union, nor shall the carrying out of the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch of prospective employees be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions or any other aspect or obligation of union membership, policies or requirements, except to the extent of enforcing Section 3 hereof.

(f) Each Local Union and each Individual Employer will post at all employment offices and at all places in any establishment where notices to employees or applicants for employment are customarily posted a copy of this Agreement.

(g) It is agreed that the matter of referring persons for employment under this agreement and operating the employment offices for such referrals is not necessarily a management or union function, but by contract may be made a union responsibility. By this contract it is made a responsibility of the union and the Local Unions in carrying out the seniority and employment rights provided in this Agreement.

The respective Local Unions and the Teamster Brewery & Soft Drink Workers Joint Board of California, agree that they will in every respect exercise the responsibility of referring workers to employment and operating employment offices therefor in accordance with law. It is distinctly understood and agreed that neither the employer nor any Individual Employer is to have or may have any right, power, voice or control

over such employment offices or the operation thereof, and that neither the Teamster Brewery & Soft Drink Workers Joint Board of California, nor any Local Union acts as the agent or representative of the employer in the operation of such employment offices. By reason of the fact that the union and the Local Unions have obtained such control thereof through regular processes of collective bargaining, it is agreed that the Union and the Local Union shall be solely responsible for their operation to all persons, agencies and tribunals, subject to the employer's right to suggest, initiate or use procedures outside this Agreement in which any alleged abuse of this function may be reviewed by others having jurisdiction.

(h) This subsection shall apply only to an Individual Employer when he has five (5) or more persons performing work covered by this Agreement. The Individual Employer will notify the employment office of the Local Union with jurisdiction by 12:00 Noon Thursday of each week of the names of brewers, bottlers, checkers or shipping and receiving clerks to be laid off at the end of the work week, and the number of such employees to be hired at the start of the work week next following. The Local Union will notify the Individual Employer the following day not later than 12:00 Noon of the number of such employees to be dispatched for employment on the following Monday to displace new Employees and/or temporary employees, and the names of such employees the Local Union was able to contact and dispatch up to that time. The above Provisions will not apply when the failure to give notice by the time specified was due to equipment breakdown, acts of God, or other reasons beyond the control of the party.



Section 6. (a) No employee shall be discriminated against for activity in or on behalf of the Union, but \* \* \*

	FIRST SHIFT		SECOND SHIFT		THIRD SHIFT	
	Weekly	Hourly	Weekly	Hourly	Weekly	Hourly
Brewers, Apprentices						
1st Year.....	\$188.25	\$5.02	\$192.00	\$5.12	\$193.87	\$5.17
2nd Year.....	190.12	5.07	193.87	5.17	195.75	5.22

Note: Weekly rates determined by multiplying hourly rate times 37½. Shift differentials of 12½¢ for the second shift and 20¢ for the third shift, effective June 1, 1971, may be established. If so, the cost will be deducted from the wage increases otherwise effective on June 1, 1971.

**WAGE RATE SCHEDULE**  
Effective June 1, 1972

	FIRST SHIFT		SECOND SHIFT		THIRD SHIFT	
	Weekly	Hourly	Weekly	Hourly	Weekly	Hourly
Brewers, Permanent....	\$220.12	\$5.87	\$223.87	\$5.97	\$225.75	\$6.02
Bottlers, Permanent....	215.62	5.75	219.37	5.85	221.25	5.90
Checkers, Permanent..	215.62	5.75	219.37	5.85	221.25	5.90

(Shipping & Receiving Clerks)

The above rates include 5¢ per hour allocated from the S.U.B. Fund and that amount is subject to reallocation to that Fund. See Section 64.

Brewers, Temporary...	\$218.25	\$5.82	\$222.00	\$5.92	\$223.87	\$5.97
Brewers, Extras.....	199.50	5.32	203.25	5.42	205.12	5.47
Bottlers, Temporary....	184.12	4.91	187.87	5.01	189.75	5.06
Checkers, Temporary..	213.75	5.70	217.50	5.80	219.37	5.85
Brewers, Apprentices						
1st Year.....	203.25	5.42	207.00	5.52	208.87	5.57
2nd Year.....	205.12	5.47	208.87	5.57	210.75	5.62

Note: Weekly rates determined by multiplying hourly rate times 37½. Shift differentials of 12½¢ for the second shift and 20¢ for the third shift, effective June 1, 1971 may have been established. If so, the cost will be deducted from the wage increases otherwise effective on June 1, 1971.

**Minute Order of District Court of Northern  
District of California.**

JUDGE LLOYD H. BURKE

CIVIL NO.: C-73-1866 LHB.

DATE: Sept. 11, 1974.

TITLE: Adam [sic] Bryant VS California Brewers  
et al.

ATTYS: James Wolpman, Willard Carr, Charles  
Miller, Wm. Alderman, David Rosenfeld, George Chris-  
tensen.

REPORTER: Betty Turrentine.

DEPUTY CLERK: John W. Nelson.

Proceeding: .....

Motions:

1. Motions to dismiss.

ORDERED: Complaint is dismissed as to all defts.  
Mr. Carr to prepare order.

[R. 518]

**Order Granting Defendants' Motions to Dismiss Pur-  
suant to Federal Rules of Civil Procedure.**

In the United States District Court, Northern District  
of California.

Abram Bryant, individually and on behalf of all  
others similarly situated, Plaintiff, v. California Brewers  
Association, et al., Defendants. Civil Action No. C  
73-1866-LHB.

Defendants' motions to dismiss pursuant to Rule  
12(b)(6), Federal Rules of Civil Procedure, came  
on for hearing before the undersigned District Judge  
on September 11, 1974. Appearances for the plaintiff  
were made by James Wolpman, Romines, Wolpman,  
Tooby, Eichner, Sorenson, Constantinides and Cohen,  
and Sherry Gendleman, Equal Employment Opportunity

Commission. Appearing for various defendants were Julius Reich, Brundage, Neyhart, Miller, Pappy and Reich; William F. Alderman, Orrick, Herrington, Rowley and Sutcliffe; David A. Rosenfeld, Levy, Van Bourg and Hackler; Willard Z. Carr, Jr., Gibson, Dunn and Crutcher; George Christensen, Overton, Lyman and Prince; and Charles G. Miller, McKenna, Fitting and Finch.

The Court having read and considered all pleadings and documents on file herein, the memoranda of points and authorities in support of and in opposition to the motions filed by the parties, the Court having heard and considered the arguments of counsel, both in support of and in opposition to the motions filed by the parties, and good cause appearing, the action is dismissed pursuant to the Federal Rules of Civil Procedure as to all defendants because the amended and supplemental Complaint fails to state a claim upon which relief can be granted.

Upon the foregoing,

IT IS ORDERED that the defendants' motion to dismiss is granted as to each defendant;

IT IS FURTHER ORDERED that judgment be entered decreeing that plaintiff take nothing by his amended and supplemental Complaint and that this Complaint and action be and the same are hereby dismissed with prejudice;

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this Order to all counsel herein.

DATED: Oct. 17, 1974.

/s/ Lloyd H. Burke  
Judge of the District Court  
[R. 519-20]

**Judgment.**

In the United States District Court, Northern District of California.

Abram Bryant, individually and on behalf of all others similarly situated, Plaintiff, v. California Brewers Association, et al., Defendants. Civil Action No. C 73-1866-LHB.

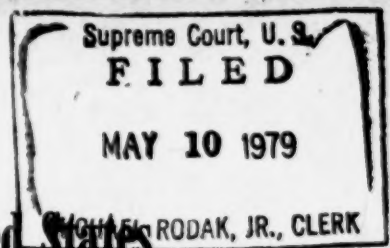
This cause having been heard in the above-entitled Court before the undersigned District Judge, and the issues having been duly considered and decided, and an order granting defendants' motions to dismiss the amended and supplemental Complaint, and for judgment having been entered,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by his amended and supplemental Complaint and that it and this action be and hereby are dismissed with prejudice.

DATED: Oct. 17, 1974.

/s/ Lloyd H. Burke  
Judge of the District Court  
[R. 521-22]

IN THE  
**Supreme Court of the United States**



October Term, 1978  
No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,

*Petitioners,*

vs.

ABRAM BRYANT,

*Respondent.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.

**RESPONDENT'S BRIEF IN OPPOSITION.**

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## SUBJECT INDEX

	Page
Reasons Why the Writ Should Be Denied .....	2
I	
Petitioners Would Have a "Seniority System" Include Elements Which Have Nothing to Do With Seniority .....	2
II	
The Court of Appeals Had Before It All of the Facts Required for a Decision .....	7
III	
No Significant Issue Has Been Presented to This Court and the Issue Submitted Is Not Dispositive of the Case .....	7
Conclusion .....	8

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## TABLE OF AUTHORITIES CITED

### Cases

Alexander v. Machinists, Areo Lodge No. 735 (6th Cir. 1977), 565 F.2d 1364 .....	5
Parson v. Kaiser Aluminum & Chemical Corp. (5th Cir. 1978), 583 F.2d 132 .....	6
Patterson v. American Tobacco Co. (4th Cir. 1978), 586 F.2d 300 .....	3
Teamsters v. United States (1977), 431 U.S. 324 ..	2

IN THE  
**Supreme Court of the United States**

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October Term, 1978  
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CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*  
vs.  
ABRAM BRYANT,  
*Respondent.*

---

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.

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**RESPONDENTS BRIEF IN OPPOSITION.**

---

The respondent Abram Bryant respectfully requests that this Court deny the Petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is officially reported at 585 F.2d 421, and is unofficially reported at 18 F.E.P.Cas. 826.

## REASONS WHY THE WRIT SHOULD BE DENIED.

### I

#### Petitioners Would Have a "Seniority System" Include Elements Which Have Nothing to Do With Seniority.

Stripped of sound and fury, the Petition makes a single argument: There is in the California Brewing Industry an overall structure for determining referrals, promotions, layoffs and other benefits. This structure has five tiers or classes of employees: (1) New Employees; (2) Apprentices; (3) Temporary Bottlers; (4) Temporary Employees (other than Bottlers); and (5) Permanent Employees. Each tier or class affords those within it some measure of job protection based upon, among other things, length of service. There are also provisions in some instances allowing workers in higher tiers preference over those beneath them both in referrals from the Union Hall to new jobs and in "bumping" during layoffs. The system also contains rules by which a worker may advance from one tier to another. This entire structure is, according to the Petitioners, a single, unified system *every part of which* is entitled to the full protection afforded *bona fide* seniority systems by Section 703(h) of Title VII, as interpreted in *Teamsters v. United States* (1977), 431 U.S. 324.

The trouble with such a claim is that it overshoots the mark. The measure of security within each tier and the right of one tier to preference over the lower tiers are, to be sure, parts of seniority. But the rules which determine entry into the system and advancement from one tier to the next have, for the most part,

nothing to do with seniority. Just because a worker advances to a new classification with additional seniority rights by passing a test does not mean that the test is part of the seniority system. Just because a worker begins to acquire seniority after completing his probationary period does not mean that probation is part of seniority. Just because a worker, once hired, begins to build seniority does not make the hiring process a part of the seniority system. *In short, Petitioners have confounded the notion of seniority with that of the qualifications required to enter a particular seniority line.*

In *Patterson v. American Tobacco Co.* (4th Cir. 1978), 586 F.2d 300, 303, the Fourth Circuit considered this very question and held:

"Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments."

It is possible, of course, to determine qualifications for promotion wholly or in part by resort to the seniority which a worker has built up in his current classification or during his overall employment. Such a system simply harkens back to the seniority measures already established to determine job security and, as such, is entitled to the same *bona fides* attributable to that system.

But that is not the case here. The requirement that, for promotion, an employee work 45 weeks in a single



calendar year does not harken back to anything. It is without counterpart in plant or classification seniority. It is a unique and autonomous criterion for promotion which—like a test or a supervisor's recommendation—is concerned solely with advancement from one classification to the next.

The Court of Appeals was very clear on this point:

"The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.* an academic degree requirement) or classification device (*e.g.* merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." 585 F.2d at 427 (fn. 11) (App. A. to Petition, p. 12).

Furthermore, as the Court of Appeals was at pains to point out:

"The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases. 'Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement.' Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L.Rev. 1532, 1534 (1962).

"In contrast, the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service. 585 F.2d at 426 (App. A to Petition, p. 9).

In this respect the situation is quite different from that in *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, cited by Petitioners. There, in bidding for promotion, length of service in a particular job was allowed to override total length of service in the plant. In other words, "job seniority" took preference over "plant seniority". Notice, however, that the basic notion that employment rights should increase as length of service increases was retained. That the focus was on service in a particular job makes no difference since, as Petitioners correctly point out, "seniority systems assume an almost infinite variety" (Petition, p. 13); and, so long as the fundamental requirement that employment rights increase with service is met, it matters not whether overall, departmental, or job seniority is selected.

The vice of the 45-week provision is that employment benefits do not increase with service:

"Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees. Although an employee must work at least 45 weeks before becoming a permanent employee, the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year." 585 F.2d at 426-7 (App. A to Petition, pp. 9-10).

There is a striking similarity between the workings of the 45-week requirement and a provision struck down by the recent decision of the Fifth Circuit in *Parson v. Kaiser Aluminum & Chemical Corp.* (5th Cir. 1978), 583 F.2d 132. There, in order to advance, the worker had to bid into a new department but, if successful, was required to stay in the lowest position in that department for 10 days or until a vacancy in a higher job became available. The Court found that the vice of such a provision—like the vice of the 45-week rule—rests in the danger that a vacancy may not arise for months, or even years.

Plaintiff's own situation illustrates this all too clearly. For seven years he worked, with only intermittent breaks in service, in the brewery industry. Over those years his job was his primary source of income. Yet, during the seven years, he was never allowed to build up the required 45 weeks of service in one calendar year; and he therefore remains, despite his years of application, a "Temporary Employee."

The *Parson* Court also addressed itself to Petitioner's argument that provisions like the 10-day or 45-week rules are protected by Section 703(h):

"While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by §703(h) and *Teamsters*." 583 F.2d at 133 (emphasis by the Court).

## II

### **The Court of Appeals Had Before It All of the Facts Required for a Decision.**

The Ninth Circuit found that the 45-week provision lacked the essential requirement of seniority; namely, that it provide benefits which, in one way or another, increase as length of service increases. In making this finding, the Court had before it the clear and unambiguous terms of the provision.

Surely Petitioners do not pretend that there are facts, unknown to the Court, which could somehow transubstantiate the 45-week provision into one in which benefits do increase with service. And, unless that be the claim, the Court of Appeals had before it all the facts required for decision.

## III

### **No Significant Issue Has Been Presented to This Court and the Issue Submitted Is Not Dispositive of the Case.**

The basic labor service for those actively engaged in collective bargaining is BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (2 vols.) It sets forth a large number of specimen contracts and contractual provisions, together with statistics indicating the prevalence of such provisions from industry to industry. One searches this service in vain for anything like the 45-week provision.

The fact of the matter is that the provision is idiosyncratic to the California Brewery Industry and so presents no significant issue requiring decision by this Court.

Petitioners also neglect to mention a facet of the Court of Appeals decision which, regardless of the outcome of their petition, would eventually require trial in the District Court.

The complaint alleges discrimination in the application, as distinguished from the existence, of the 45-week provision such that white workers who had not complied with its strictures were nevertheless advanced to permanent status while Black employees remained Temporaries. 585 F.2d at 424, 428 (App. A to Petition, pp. 4-5, 12-13). This is an issue which must be tried regardless of what happens in this proceeding.

**Conclusion.**

The Court of Appeals correctly determined that the 45-week provision was merely a device, like a test or an academic degree, which was used to decide who could enter a particular seniority line and that it bore no relationship to the legitimate end of seniority—to bestow benefits based on length of service. Nothing in the Petition for a writ of certiorari contravenes those findings. The writ should therefore be denied.

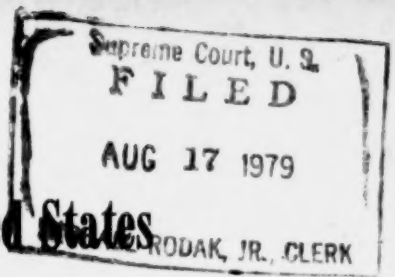
Respectfully submitted,

JAMES WOLPMAN,

*Attorney for Respondent.*



IN THE  
**Supreme Court of the United States**



No. 78-1548  
October Term, 1979

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*  
  
vs.  
  
ABRAM BRYANT,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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## SUBJECT INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	1
Statutory Provision Involved .....	2
Questions Presented .....	2
Statement of Case .....	3
Summary .....	3
Respondent's Complaint .....	4
Collective Bargaining Agreement .....	6
A. The Separate Tiers of Seniority in the Brewery Industry .....	7
B. The Operation of Seniority in the Brewery Industry .....	8
1. Dispatching and Job Referrals .....	8
2. Layoffs .....	11
3. Permanent Employees' Job Assign- ment and "Bumping" Rights .....	12
Proceedings in the District Court .....	12
Appeal to the Court of Appeals for the Ninth Circuit .....	12
Summary of Argument .....	15



	Page
Argument .....	18

### I

Respondent Alleges That the Brewery Industry Seniority System, Including the 45 Week Provision, Perpetuates the Effects of Past Discrimination. Respondent's Central Theory of Recovery Has Been Explicitly Rejected in Teamsters vs. United States .....	18
---	----

### II

The 45 Week Provision Is Not an "All-or-Nothing Proposition," Since Temporary Employees Also Have Seniority Rights. Rather, It Is an Important Part of a Single, Integrated, Tiered Seniority System .....	20
--	----

### III

Under Title VII and Federal Labor Law, Employers and Unions Must Be Guaranteed Maximum Possible Freedom, Subject to Good Faith, in Adapting Principles of Seniority to Specific Collective Bargaining Situations .....	22
--	----

- A. The wide variety of seniority provisions in American industry dispels the notion that time is the sole element of a seniority system ..... 25
- B. The 45 week provision is virtually indistinguishable from any number of seniority provisions commonly employed in American industry ..... 31

	Page
C. The Ninth Circuit's definition of "seniority system" threatens the flexibility and adaptability of seniority systems .....	32
1. The Appellate Court's definition is inconsistent with the principle that under Title VII no type of seniority system is preferred .....	32
2. Seniority systems must be scrutinized in their entirety. No individual component of a seniority system should be singled out for judicial scrutiny under Title VII .....	34
D. The principle that a seniority system must be bona fide is the only limitation on the immunity conferred by Section 703(h) ....	35
1. The "bona fide" or good faith limitation on Title VII protections for seniority systems parallels standards developed under the National Labor Relations Act .....	36
2. In light of Teamsters holding that bona fide seniority systems are protected, Respondent must prove intentional discrimination in order to prevail .....	39

### IV

The Appellate Court Abused Its Authority When It Purported to Establish the Law of the Case Respecting the 45 Week Provision's Relationship to the Brewery Seniority System Without Factual Basis and Despite Clear Admissions by Respondent .....	41
--	----

iv.

	Page
A. The Court of Appeals purported to foreclose further litigation over the relationship of the 45 week provision to the seniority system .....	42
B. The Court of Appeals' determination was rendered despite the absence of a factual record .....	42
C. The Court of Appeals acted improperly in purporting to foreclose further litigation of a factual issue in the context of a 12 (b)(6) motion to dismiss .....	43
Conclusion .....	46

v.

# TABLE OF AUTHORITIES CITED

Cases	Page
Aeronautical Industrial District Lodge 727 v. Campbell (1949), 327 U.S. 521 .....	26, 28, 29, 31, 32
Alexander v. Machinists, Aero. Lodge No. 735 (6th Cir. 1977), 565 F.2d 1364, cert. denied (1978), 436 U.S. 946 .....	3, 31, 33, 34
Boys Market v. Retail Clerks Union (1970), 398 U.S. 235 .....	24
Braden v. University of Pittsburgh (3d Cir. 1977), 552 F.2d 948 .....	45
Crocker v. Boeing Co. (Vertol Div.) (E.D.Pa. 1977), 437 F.Supp. 1138 .....	34
East Texas Motor Freight System, Inc. v. Rodriguez (1977), 431 U.S. 395 .....	46
Ford Motor Company v. Huffman (1953), 345 U.S. 330 .....	15, 16, 37, 38
Fountain v. Filson (1949), 336 U.S. 681 .....	46
Furnco Construction Company v. Waters (1978), 57 L.Ed.2d 957 .....	40
Griffin v. International Union (4th Cir. 1972) 469 F.2d 181 .....	39
Griggs v. Duke Power Company (1971), 401 U.S. 424 .....	34, 39
Hardcastle v. Western Greyhound Lines (9th Cir. 1962), 303 F.2d 182, cert. denied (1962), 371 U.S. 920 .....	38
Hazelwood School District v. United States (1977), 433 U.S. 299 .....	46
Humphrey v. Moore (1964), 375 U.S. 335 .....	38

	Page
James v. Stockham Valves & Fittings Co. (5th Cir. 1977), 559 F.2d 310, cert. denied (1978), 434 U.S. 1034 .....	36, 39, 41
Lipsky v. Commonwealth United Corp. (2d Cir. 1976), 551 F.2d 887 .....	45
Mann v. Adams Realty Co., Inc. (5th Cir. 1977), 556 F.2d 288 .....	45
Mariash v. Morrill (2d Cir. 1974), 496 F.2d 1138..	46
N.L.R.B. v. Wheland Co. (6th Cir. 1959), 271 F.2d 122 .....	29
Outland v. Civil Aeronautics Board (D.C. Cir. 1960), 284 F.2d 224 .....	29, 30
Scheuer v. Rhodes (1974), 416 U.S. 232 .....	44, 45
Schick v. N.L.R.B. (7th Cir. 1969), 409 F.2d 395..	38
Steelworkers v. Weber (1979), ..... U.S. ....	22
Teamsters v. United States (1977), 431 U.S. 324 .....	3, 13, 15, 16, 17, 18, 19, 20, 22, 26
.....31, 32, 33, 34, 35, 36, 39, 40, 41, 46	
Vaca v. Sipes (1967), 386 U.S. 171 .....	38
Watson v. Teamsters (5th Cir. 1968), 399 F.2d 875 .....	31

#### Miscellaneous

Bureau of National Affairs, Collective Bargaining Negotiations and Contracts: Basic Patterns— Clause Finder .....	26
Commerce Clearing House, Union Contract Clauses, ¶ 51,429 (1954) .....	26, 31
House Report No. 914, 88th Congress, 1st Session, Part 2 (1963), p. 29 .....	22

	Page
United States Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective Bargaining Agreements: Administration of Seniority, pp. 5-7, 21-24, 25-31 (1972) .....	25, 26, 27, 28

#### Rules

Federal Rules of Civil Procedure, Rule 12(b)(6) ..	43
--	----

#### Statutes

Civil Rights Act of 1866, 42 U.S.C. Sec. 1981 .....	4
Civil Rights Act of 1964, Title VII, Sec. 703(h) .....	2, 3, 13, 15, 16, 22, 32, 34, 35, 36, 39, 40, 46
Civil Rights Act of 1964, Title VII, 42 U.S.C. Sec. 2000e .....	4
National Labor Relations Act, Sec. 8(d) (29 U.S.C. § 158(d)) .....	24
United States Code, Title 28, Sec. 1254(1) .....	2
United States Code, Title 42, Sec. 2000e-2(h) (1976 ed.), p. 1238 .....	2

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	Page
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IN THE  
**Supreme Court of the United States**

No. 78-1548  
October Term, 1979

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*  
  
vs.  
  
ABRAM BRYANT,  
  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

**Brief of Petitioners**  
**California Brewers Association and California Breweries**

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Ninth Circuit was officially reported at 585 F.2d 421, unofficially reported at 18 F.E.P. Cas. 826, and is set forth in Appendix A to the Petition for Writ of Certiorari. No opinion was rendered by the district court for the Northern District of California.

**JURISDICTION**

The judgment of the Court of Appeals was entered on November 3, 1978. Petitioners filed a timely motion for rehearing, which was denied on January 11, 1979.

A timely petition for writ of certiorari was filed on April 11, 1979.

Certiorari was granted on June 4, 1979.

Jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

#### STATUTORY PROVISION INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

“(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . .”

42 U.S.C. § 2000e-2(h) (1976 ed.) p. 1238.

#### QUESTIONS PRESENTED

For almost 25 years, collective bargaining agreements in the California brewing industry have included a provision that any employee who has worked for 45 weeks in any calendar year is classified as a Permanent employee and is entitled to greater benefits and job security than other employees.

The questions presented are:

##### I

Whether this provision is part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

##### II

Whether the Ninth Circuit's definition of the term “seniority system” conflicts with the definition of this

Court in *Teamsters v. United States* (1977), 431 U.S. 324, and the definition of the Sixth Circuit in *Alexander v. Machinists, Aero. Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, *cert. denied* (1978), 436 U.S. 946.

##### III

Whether the Court of Appeals erred by summarily deciding the seniority issue before development of a factual record concerning the operation and purposes of the brewery industry system.

#### STATEMENT OF CASE

##### Summary

In this case, the Respondent, plaintiff below, alleges that the seniority provisions of the brewery industry collective bargaining agreement perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Under one of these provisions, any employee who has worked for 45 weeks in a calendar year is a Permanent employee and is entitled to greater benefits and job security than non-Permanent employees.

The Court of Appeals considered the issue of whether the brewery industry seniority system was immune under Section 703(h) of Title VII, after this Court decided *Teamsters v. United States* (1977), 431 U.S. 324. In essence, the Court of Appeals decided that the 45 week provision was not part of the overall seniority system, and therefore might violate Title VII despite Section 703(h).

### Respondent's Complaint

Respondent Abram Bryant, plaintiff below,<sup>1</sup> filed his original Complaint on October 19, 1973 [R.1], an Amended Complaint on February 15, 1974 [R.106], and a Second Amended Complaint on May 22, 1974. [A.9.]

The Complaint alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, and provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, because of "seniority and referral" provisions in the collective bargaining agreement. [A.16.] The defendants are an employer association,<sup>2</sup> a union joint board,<sup>3</sup> seven breweries,<sup>4</sup> and six unions.<sup>5</sup>

<sup>1</sup>Respondent Abram Bryant was first employed by petitioner Falstaff in 1968. Since that time, he was employed from time to time by Falstaff. [R.452.] He also worked for petitioner Hamms for a brief period. [R.453.]

<sup>2</sup>The employer association is the California Brewers Association, one of the petitioners before the Court.

<sup>3</sup>The union joint board is the Teamster Brewery & Soft Drink Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

<sup>4</sup>The seven breweries are: Miller Brewing Company, Joseph Schlitz Brewing Company, Anheuser Busch Incorporated, Pabst Brewing Company, Theodore Hamm Company, General Brewing Company, Falstaff Brewing Corporation.

<sup>5</sup>The six defendant unions are: Local Union 856 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Sales Drivers and Dairy Employees Union Local 166; the Bottlers Union Local 896 of the International Brotherhood of Teamsters; Beer Drivers and Salesmens Union Local 888 of the International Brotherhood of Teamsters; Drivers Union Local 203 of the International Brotherhood of Teamsters; Sales Drivers Helpers and Dairy Employees Union Local 683 of International Brotherhood of Teamsters.

Respondent's Complaint also includes allegations that the defendant unions breached their duty of fair representation by failing to negotiate a contract that secured to the Respondent and members of his class "seniority and referral benefits to which they are entitled." [A. 19.]

The primary focus of Respondent's claims is the "45 week provision" of the seniority system, contained in the collective bargaining agreement between California breweries and brewery unions.<sup>6</sup> Under this provision a Temporary employee must work 45 weeks in one calendar year before being classified as a Permanent employee and thus entitled to additional fringe benefits and greater job security. The operation of this provision is set forth in Sections 4 and 5 of the Agreement, and is discussed *infra*.

According to the allegations of the Respondent, the seniority system, even if applied fairly, perpetuates past discrimination in the brewery industry. Respondent's theory of recovery is fully set forth in the verified Second Amended Complaint:

"\*13. In past years, going back as far as their inception, the defendant employers have dis-

<sup>6</sup>Respondent also alleged intentional discrimination in two incidents of alleged deviation from the terms of the collective bargaining agreement. Respondent claims that certain unidentified non-black employees who worked forty-five weeks in two (2) calendar years were granted permanent status. Second Amended Complaint, Paragraph 21. [A.17.] However, according to Respondent's Answers to Interrogatories, this incident evidently occurred in 1958. [R.297.] Respondent admits that since the date of his employment, he is unaware of any non-black employee who has achieved permanent status without satisfying the 45 week provisions. [R.297, 306.] Respondent also alleged that after filing of the original Complaint his local union, Local Union 856 of the International Brotherhood of Teamsters, improperly failed to refer him to unidentified job assignments, referring less senior white workers instead. [A.18.]



criminated against blacks both in hiring and employment.

\* \* \*

"\*14. The vehicles for the perpetuation of this invidious discrimination are the seniority and referral provisions of the collective bargaining agreement, which were negotiated a number of years ago. These provisions have been negotiated and maintained in the collective bargaining agreement by the defendant employers and unions acting in concert with each other and through the California Brewers Association and the Joint Board as their agents. All defendant employers and unions have acted to enforce these illegal provisions and, in particular, the Sections 4(a)(1) and 4(5)(a) dealing with permanent status.

"\*15. Given the circumstances which have existed in the brewery industry in California, ~~these~~ seniority and referral provisions have operated to prevent plaintiff and the members of his class from achieving the rights and benefits accorded permanent employees or even from having a reasonable opportunity of achieving those rights and benefits."

Second Amended Complaint, Paragraphs 13-15. [A.16-17.]

### **Collective Bargaining Agreement**

The collective bargaining agreement in this case is between the California Brewers Association on behalf of various breweries and the Teamster Brewery and Soft Drink Workers Joint Board of California.<sup>7</sup> [A.25.]

<sup>7</sup>Substantial changes have occurred in the brewery operation in California which must be examined at trial. No Northern California brewery formerly covered under the collective bargain-

It establishes an industry-wide seniority system, defined in Sections 4 and 5 of that contract. [A.27 *et seq.*, 36 *et seq.*]

### **A. The Separate Tiers of Seniority in the Brewery Industry.**

The preamble to Section 4 specifically provides that with respect to Brewers and Bottlers there shall be five classes of employees "for the purposes of seniority only": (i) New employees; (ii) Apprentices; (iii) Temporary Bottlers; (iv) Temporary employees (other than Bottlers); (v) Permanent employees. [A.27.]

An individual's status in any of these classes (except apprenticeship) is solely a function of time served in a job classification in the industry.

The contract provides that an employee acquires Permanent status, and enhanced job benefits and security, after working 45 weeks in one calendar year. [A.27.] This 45 week provision has been in effect for almost twenty-five years. [A.16, R.7.] A Temporary employee must have worked at least 60 working days within a calendar year. Apprentices are covered by separate provisions. New employees are persons who

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ing agreement is in operation. Falstaff Brewing Corporation, Theodore Hamm Company and General Brewing Corporation formerly operating in the San Francisco area are all closed. There are only four companies currently operating in Southern California: Miller Brewing Company, Jos. Schlitz Brewing Company, Anheuser-Busch, Inc. and Pabst Brewing Company. Moreover, Pabst is in the process of closing its Southern California brewery. These companies no longer operate under a California Brewers Association agreement but have individual agreements. The Teamster Brewery & Soft Drink Workers Joint Board of California is no longer in existence and is not a contracting party.

do not qualify as a Permanent employee, Temporary employee or Apprentice.<sup>8</sup> [A.28-29.]

**B. The Operation of Seniority in the Brewery Industry.**

As the Respondent once conceded, "[t]he seniority clause with which we are concerned is probably as elaborate as any there is." Plaintiffs' Memorandum of Points and Authorities in Response to Defendants' Motions to Dismiss, page 3, note 2. [R.79.] This seniority system is based upon both "industry-wide" seniority and "plant" seniority. It is used for such competitive purposes as determining the order in which employees are dispatched for particular jobs, and the order in which employees are laid off.

**1. Dispatching and Job Referrals.**

Section 5 of the collective bargaining agreement sets forth the procedures by which "the Individual Employer must secure all employees covered by this Agreement." [A.36.]

If a brewery needs workers, employees are dispatched through the employment offices of the appropriate local union affiliated with the Teamster Brewery & Soft Drink Workers Joint Board of California. The contract explicitly provides that referral of persons for employment is "a responsibility of the union and the

<sup>8</sup>Other sections of the collective bargaining agreement relate to the loss of seniority. For example, a Permanent employee who is not employed for a period of two years loses the status of a Permanent employee (Section 4(a)(5)). Similarly an employee who quits the industry or is discharged for failure to comply with the union security requirements loses his status and seniority (Section 4(a)(5)). An example of the duality of the seniority system is apparent in this same section: a Permanent employee who is discharged by an employer loses establishment seniority with that employer but not industry seniority.

Local Unions in carrying out the seniority and employment rights provided in this Agreement." Section 5(g). [A.40.]

Employees who have been on layoff are dispatched according to the following contractually specified order of seniority<sup>9</sup>:

First, Permanent employees of the individual employer "in descending order of seniority, the employee with the highest seniority to be dispatched first";

Second, Permanent employees registered in "the established bumping area"<sup>10</sup>;

Third, Temporary employees of the individual employer;

Fourth, Temporary employees registered in the established area;

Fifth, New employees of the individual employer;

Sixth, New employees in the established area.

After the employment rolls have been exhausted, the appropriate local union must next dispatch applicants who are registered for employment.<sup>11</sup>

<sup>9</sup>The order of dispatch is substantially the same for bottlers. [A.37-38.]

There are two specific exceptions to the application of these priorities in the contract. If an employer has a job for an employee, other than a Bottler for less than thirty-seven and one-half straight-time hours, the local union shall dispatch any readily available employee without regard to seniority. However, such work does not "count" toward establishment of seniority rights. If an employer requests a Bottler for work less than thirty straight-time hours in a calendar week, registered Temporary Bottlers are dispatched first. [A.36-37.]

<sup>10</sup>The "established bumping areas" under the agreements are the Northern California area and the Southern California area.

<sup>11</sup>The relevant contractual provision, Section 5(c) reads as follows:

"[T]he Local Union shall dispatch and the Individual Employer shall hire as follows:

(This footnote is continued on next page)

In summary, job opportunities for all employees are allocated according to the seniority principles of the contract. These principles mean that satisfying the 45 week provision depends on acquiring enough job assignments to accumulate the necessary service time. As between Temporary employees, job assignments are also allocated according to seniority. Section 5(c)(4). [A.38.]

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*"(1) In dispatching the Local Union shall first dispatch in accordance with the seniority provisions set out in Section '4' hereof in descending order of seniority, the employee with the highest seniority to be dispatched first.*

*"(2) In the case of Brewers, Drivers, Shipping and Receiving Clerks and Checkers the Local Union shall next dispatch permanent employees registered in the established area who may be unemployed and thereafter temporary employees registered in the established area who may be unemployed and thereafter new employees who may be unemployed, subject to Section 43. In the case of Bottlers the Local Union shall next dispatch permanent Bottlers registered in the previously established bumping area who may be unemployed, and thereafter permanent employees registered in the previously established bumping area in other classifications, who may be unemployed, and thereafter the Individual Employer may employ Temporary Bottlers. The Individual Employer shall have full right of selection among said employees.*

*"(3) The Local Union shall next dispatch applicants who may be registered for employment under Section '5 (d)' hereof, provided, however, that in dispatching such applicants those with the most experience in the work in the State of California shall be dispatched first and those with the least experience in such work in the State of California shall be dispatched last, and thereafter those with the most experience in the work regardless of where acquired shall be dispatched first and those with the least experience in the work last, and thereafter those with no experience in the work shall be dispatched in accordance with the date the application was filed, those with the earliest date being dispatched first. The Individual Employer shall have full right of selection among said employees dispatched.*

*"(4) The order of dispatch of permanent employees and of temporary employees and of new employees within*

## 2. Layoffs.

All layoffs are decided on the basis of a combination of industry and plant seniority. Section 4(c). [A.30-31.] New employees are laid off first, followed by Temporary employees. Permanent employees have the most job security. Within each classification, Permanent, Temporary or New, the least senior employee based on plant seniority is the first laid off and the most senior employee who is not working is the first rehired. Also, any employee "bumped" by a Permanent employee will be the least senior Temporary or New employee at the particular plant. Section 4(b). [A.30.] Separate seniority lists are maintained for Apprentices.

Plant seniority dates from the first day of employment in the seniority tier within the establishment. When seniority of two or more employees dates from the same date, relative seniority is established based upon the length of service in California breweries. Section 4(c).<sup>12</sup> [A.31.]

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*classifications as provided in paragraph (c) (2) hereof shall be on the basis of the length of service in the industry in California.*

*"(5) In the event an employee is dispatched pursuant to subsection '(c) (1)' hereof and he does not report for work within forty-eight (48) hours, he shall lose his seniority rights in the individual establishment to which he was dispatched, unless such failure is excused under Section '7(a), (b) or (d)' hereof." [Emphasis added.]*

*Section 5(c), [A.37-38.]*

<sup>12</sup>An employee who has seniority at one establishment or plant but is working in another establishment can lose his seniority if he refuses recall to the first plant or establishment (Section 4(d)). However, an employee who accepts a transfer from one plant to another plant retains his first plant seniority for a period of two years from the date of transfer provided he is not recalled or does not transfer back to the first plant (Section 4(e)).



### 3. *Permanent Employees' Job Assignment and "Bumping" Rights.*

By satisfying the 45 week provision, the Permanent employee acquires rights to fill vacancies or jobs held by Temporary or New employees.

A Permanent employee who has been laid off by one employer in the industry may be dispatched to another employer in the same area. The Permanent employee has a right to replace the Temporary or New employee with the lowest plant seniority (Section 4(b)). [A.30.] As between two or more unemployed Permanent employees, the Permanent employee with the most industry seniority will be entitled to a certain job. Section 5(c)(1). [A.37.]

#### **Proceedings in the District Court**

On September 11, 1974, the district court granted motions to dismiss as to all defendants because of plaintiff's failure to state a claim upon which relief could be granted. [A.43.] The district court concluded that the seniority and referral provisions complained of by the Respondent were analogous to the "last-hired, first-fired" practices permitted under Title VII. 585 F.2d at 424. Judgment was entered on October 17, 1974. [A.45.]

#### **Appeal to the Court of Appeals for the Ninth Circuit**

On appeal, Respondent emphasized that "seniority and referral systems which are not discriminatory on their face, may nevertheless be struck down if they serve to perpetuate the discrimination of the past." Opening Brief for the Appellant, page 9. The appeal was fully briefed and argued before the Ninth Circuit

prior to the decision of this Court in *Teamsters v. United States*. Supplemental briefs discussing the import of *Teamsters* were submitted to the appellate court. Thus, the parties focused on the importance of Section 703(h) and the seniority issues of the case, particularly as illuminated in *Teamsters*, for the first time on appeal to the Ninth Circuit.

On November 3, 1978, the Court of Appeals for the Ninth Circuit, in a two to one decision, reversed the judgment of the district court and remanded the case "for further proceedings consistent with the views . . . expressed" in the court's opinion. 585 F.2d at 428.

The Ninth Circuit held that the 45 week provision of the collective bargaining agreement was neither a seniority system nor part of such a system:

"No comprehensive definition of 'seniority system' is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the fundamental component of such a system. Accordingly, we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination.

"The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases."

585 F.2d at 426.

Characterizing the 45 week provision as "an all-or-nothing proposition," 585 F.2d at 427, the Ninth Circuit ruled that "the brewery industry's 45 week

requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service." 585 F.2d at 426.

The Ninth Circuit concluded that since the 45 week provision had no relationship to any seniority system, Respondent would not be required to prove intentional discrimination. Rather, unlawful employment discrimination might be established if Respondent demonstrates adverse impact against blacks deriving from the routine application of the provision:

"Because the 45-week provision is not part of a seniority system, plaintiff is not required to prove any form of intentional discrimination to make out a Title VII violation. Instead, the normal rule applies that 'a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.' *Teamsters*, 431 U.S. at 349, 97 S.Ct. at 1861. The controlling principle is that such employment practices which have discriminatory impact violate Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

\* \* \*

"Accordingly, the judgment must be reversed and the cause remanded to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, under standards enunciated in *Griggs*." [Footnote omitted.]

585 F.2d at 427-28.

## SUMMARY OF ARGUMENT

In *Teamsters v. United States* (1977), 431 U.S. 324, this Court held that under Section 703(h), the routine application of a bona fide seniority system cannot be a violation of Title VII.

Throughout this litigation Respondent has proclaimed that the brewery seniority system, including the 45 week provision, perpetuates the effects of past discrimination. In other words, the essence of Respondent's attack is identical to the theory rejected by this Court in *Teamsters*.

In this context, the primary issue to be decided is whether the 45 week provision is a component of the seniority system, potentially protected by Section 703(h).

### I

Contrary to the judgment of the Ninth Circuit, the 45 week provision is not an "all-or-nothing proposition." In fact, Temporary employees have crucial seniority rights respecting job referrals and layoffs. Satisfaction of the 45 week provision merely augments those rights. The provision is an important part of a single, integrated, tiered structure, in which job security and other benefits are governed by a delicate, complicated blend of industry and plant seniority.

### II

The decision of the Ninth Circuit, if allowed to stand, would represent a major departure from federal policies allowing employers and unions maximum possible freedom, subject to good faith, in adapting principles of seniority to their own collective bargaining situation. *Ford Motor Company v. Huffman* (1953),

345 U.S. 330, 338. This policy preserves flexibility and adaptability in collective bargaining, which is necessary for resolution of the difficult conflicts of interest inherent in industrial life.

As a result, the opinion of the Ninth Circuit is an unprecedented attempt to impose rigid restrictions concerning the operation of seniority.

Moreover, the appellate court's definition violates the principle articulated in *Teamsters v. United States* that no single type of seniority system is preferred under Section 703(h) of Title VII.

Finally, the Ninth Circuit has dissected an operating seniority system and has selected one component of that system for judicial scrutiny under Title VII. This decision to view the 45 week provision as a separate device unrelated to the seniority system was rendered without an adequate factual record, and was premised on the most theoretical hypotheses about the operation of the overall seniority system.

### III

The decision of the Ninth Circuit on the "seniority" issue is also contrary to (i) the admissions of all parties in this case that the 45 week requirement was part of a seniority system; (ii) uncontroverted facts concerning the character, operation and structure of the seniority system; and (iii) the explicit admonitions of this Court in *Teamsters*. Indeed, the Ninth Circuit decided that this component was not part of a seniority system despite the fact that all parties initially

and extensively briefed the case assuming and admitting that the 45 week requirement was part of such a system.

### IV

Unless Title VII was intended to usher in a new regime in which individual components of seniority systems are closely scrutinized apart from standards of good faith, the opinion of the Ninth Circuit must be vacated and its judgment must be reversed. In short, the 45 week provision must be considered part of the overall seniority system. Federal courts should not attempt to enter the thicket of trying to set inflexible rules for seniority systems. Rather, they should continue to impose judicial standards that require that the bargains of employers and unions be products of good faith. This long-standing principle, these standards of judicial scrutiny, should not be ignored in an effort to circumvent *Teamsters v. United States*.

Therefore, the Court should vacate the judgment of the lower court and rule that the 45 week provision is a part of the seniority system of the brewery industry. When the case is remanded, Respondent should be confined to his allegations of intentional discrimination.

Alternatively, the district court should be instructed to disregard the opinion of the Ninth Circuit and to consider whether the 45 week provision is part of the seniority system, based upon a full factual record in light of *Teamsters v. United States*.



## ARGUMENT

### I

**RESPONDENT ALLEGES THAT THE BREWERY INDUSTRY SENIORITY SYSTEM, INCLUDING THE 45 WEEK PROVISION, PERPETUATES THE EFFECTS OF PAST DISCRIMINATION. RESPONDENT'S CENTRAL THEORY OF RECOVERY HAS BEEN EXPLICITLY REJECTED IN TEAMSTERS VS. UNITED STATES.**

The Second Amended Complaint is clear and unambiguous with respect to Respondent's central theory of recovery under Title VII. The Complaint alleges that the seniority and referral provisions of the collective bargaining agreement were "vehicles for the perpetuation of . . . invidious discrimination." Second Amended Complaint, paragraph 14. [A.16.]

"[The seniority system's] illegality arises because it has had the effect of perpetuating a pattern of racial discrimination which existed in years gone by. [Citations omitted.] \* \* \*

*"Plaintiff's attack is, therefore, aimed directly at the seniority system created in the contract; for only by reconstructing that system so that it protects Black and White workers alike, without giving one a headstart over the other, can equal employment rights be realized.*

\* \* \*

"A careful reading of the complaint will disclose that plaintiff is not objecting to the seniority clause because it favors employees with greater seniority over newer employees. Plaintiff attacks the seniority clause because it is the vehicle by which an illegal pattern of discrimination which existed in

the breweries in the past has been perpetuated." [Emphasis added.]

Plaintiff's Memorandum of Points and Authorities in Response to Motion to Dismiss, pp. 2, 25-26. [R.78, 101-2.]

This theory of recovery is indistinguishable from the arguments advanced by numerous plaintiffs, prior to the decision of this Court in *Teamsters v. United States*. As alleged by Respondent, the vice of the brewery system was that it prolonged the effects of past discrimination by keeping minority workers in Temporary employee positions, because of the preferences conferred on existing Permanent employees.

The words of this Court in *Teamsters v. United States* are the clearest indication that "the routine application of a bona fide seniority system [is] not unlawful under Title VII," 431 U.S. at 352, even if it operates to delay elimination of pre-Act patterns of employment.

"Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

"\* \* \* Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise

those rights, even at the expense of pre-Act discriminatees.”

431 U.S. at 352-54.

## II

**THE 45 WEEK PROVISION IS NOT AN “ALL-OR-NOTHING PROPOSITION,” SINCE TEMPORARY EMPLOYEES ALSO HAVE SENIORITY RIGHTS. RATHER, IT IS AN IMPORTANT PART OF A SINGLE, INTEGRATED, TIERED SENIORITY SYSTEM.**

The California brewery seniority system is one integrated structure, divided into separate tiers of job security and benefits—governed by a delicate blend of plant and industry-wide seniority. The labor contract creates a seniority system, and the 45 week provision is part of that system.

The Ninth Circuit misconstrued the 45 week provision as an “all-or-nothing proposition.” 585 F.2d at 427. The Court of Appeals erroneously held that, until an employee has worked 45 weeks in a calendar year, “it makes no difference how long a person has been employed by a department, plant, company, or industry. . . .” 585 F.2d at 427. This is not true, since length of service plays a critical role in the allocation of job opportunities among Temporary employees, and even among New employees.

The process of dispatching employees to vacant jobs illuminates the Ninth Circuit’s error. To be sure, unemployed Permanent employees are dispatched first. However, among Temporary employees, jobs are also allocated according to the employees’ length of service in the brewery industry. This means that the chances for becoming a Permanent employee are enhanced over time: The more senior Temporary employees are more

likely to work the necessary period in a year because they have first claim to the jobs.

Unlike seniority provisions that begin to accumulate only after a probationary period, the brewery system confers seniority on Temporary employees and on New employees as well. The Court of Appeals overlooked this fact when it stated that the brewery seniority system “does not involve an increase in employment rights or benefits based upon the length of . . . accumulated service.” 585 F.2d at 426.

In short, the acquisition of Permanent status is not independent of total time worked, except in the most technical sense. To be sure, an employee’s chance to become a Permanent employee is influenced by other factors, such as plant seniority which governs layoffs among Temporary employees. It may also be influenced by luck of the draw, since one Temporary employee might be dispatched to a job that unforeseeably ends quickly, while another less senior Temporary employee is dispatched to a job that lasts. Still, the contractual blend of industry and plant seniority governs job referrals and layoffs.

The Ninth Circuit misunderstood the seniority system. Consequently, it overestimated the potential for unlawful discriminatory manipulation of the system. The Ninth Circuit held that the system was “particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status.” 585 F.2d at 427. It is hard to characterize this passage from the Court’s opinion as anything but pure theory, since the record is devoid of any allegation that “manpower

requirements" and "patterns" have been manipulated. As with all seniority systems, the brewery structure, including the 45 week provision, provides that "seniority rights . . . usually accumulate automatically over time." Moreover, because of the system's provisions respecting dispatching and layoffs, "it is difficult to manipulate [the system] in a discriminatory manner," except in derogation of the contractual provisions. 585 F.2d at 427.

### III

#### UNDER TITLE VII AND FEDERAL LABOR LAW, EMPLOYERS AND UNIONS MUST BE GUARANTEED MAXIMUM POSSIBLE FREEDOM, SUBJECT TO GOOD FAITH, IN ADAPTING PRINCIPLES OF SENIORITY TO SPECIFIC COLLECTIVE BARGAINING SITUATIONS.

Section 703(h) of Title VII protects bona fide seniority systems. *Teamsters v. United States* (1977), 431 U.S. 324. This special statutory protection reflects the intention of Congress to limit the intrusiveness of governmental regulation incident to civil rights legislation.

"Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible.' "

*Steelworkers v. Weber* (1979), .... U.S. ...., quoting H.R. Rep. No. 914, 88th Congress, 1st Session, Part 2 (1963), at 29.

Moreover, seniority systems were an appropriate special concern of Congress because of their special nature and purpose in collective bargaining and industrial relations. To be sure, seniority systems are not the

inventions of employers. They are the creatures of collective bargaining and labor contracts in which unions asserted an interest in restraining the employers' discretion to reward and punish employees. In the words of Professor Benjamin Aaron:

"[E]very seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all the others."

B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1534-35.<sup>13</sup>

<sup>13</sup>Professors George Cooper and Richard B. Sobol summarized the traditional justifications for seniority in an article generally critical of the impact of seniority systems on black workers.

"Seniority has traditionally been championed by labor rather than management, and has usually been adopted not because the employer thinks it necessary or even helpful, but because of the bargaining strength of the union.

"Although the lines between them are not sharp, three reasons can be articulated for organized labor's insistence on seniority systems. First, although seniority does not completely tie the hands of the employer, it does tend to reduce his options in allocating work. As a result, it provides employees with a degree of independence from the whims or personal preferences of supervisory officers. Second, seniority provides union leadership with an instrument for determining its position in case of a dispute among its members, and thereby permits the union to avoid making an ad hoc decision to assert one worker's claim rather than another's. From the point of view of the employee, the effect of seniority in regulating the union's position is not unlike its effect in regulating the decisions of management. Third, seniority systems provide all employees with a basis for predicting their future employment position." [Footnotes omitted.]

G. Cooper and R. B. Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv.L.Rev. 1598, 1604-05.



Historically, most seniority systems did not have their genesis as obstacles to the struggle for equality between black and white; rather, such systems were born of the struggle for equity between labor and management. Seniority was devised as an objective, neutral criterion designed to protect employees from another form of discrimination—discrimination against union adherents and leaders. It is also a relatively effective, easily-administered, and widely-accepted technique for making employment decisions that would otherwise be controversial and upsetting. Thus, one objective of seniority systems is the achievement of a degree of stability, predictability and objectivity in industrial relations. This objective is consistent with federal labor policy.

“As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes.”

*Boys Market v. Retail Clerks Union* (1970), 398 U.S. 235, 251.

Seniority systems like arbitration procedures and no-strike guarantees are important means of protecting industrial peace. Admittedly, statutes permitted employers and unions to decide for themselves whether or not to adopt these provisions. Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d). However, federal law consistently enforced these provisions, once adopted by the parties, as a means of encouraging collective bargaining and peaceful resolution of industrial disputes. Cf. *Boys Markets v. Retail Clerks Union* (1970), 398 U.S. 235.

In short, seniority has an important role in this nation's policy of employment relations. It is a reasonable, flexible, adaptable technique for negotiation and compromise of the diverse conflicts of interest that may exist among employees. For this reason, if for no other, employers and unions must be afforded maximum possible freedom in adapting the principles of seniority to the peculiarities and exigencies of their own collective bargaining situations.

**A. The wide variety of seniority provisions in American industry dispels the notion that time is the sole element of a seniority system.**

A seniority system is far more easily described than defined.

“Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. . . . [T]he different types . . . range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity.”

B. Aaron, “Reflections on the Legal Nature and Enforceability of Seniority Rights,” 75 Harv.L.Rev. 1532, 1534.

However, there are certain patterns in seniority systems, which patterns might suffice as basic components of an appropriate definition.<sup>14</sup>

<sup>14</sup>Although the literature on seniority is plentiful, attempts to define “seniority systems” are rare and conclusory. There have been many compilations of different seniority clauses. See, e.g., U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective Bargaining Agreements: Administration of Seniority (1972); T. J. McDermott, Types of Seniority Provisions and the Measurement of Ability, 25 Arbit.J. 101 (1970); F. H. Harbison, Seniority Policies and Procedures as (This footnote is continued on next page)

*Seniority* is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job. A *seniority system* is any system by which employment decisions are made or job benefits are allocated according to a standard of seniority, whether or not that standard is utilized alone or as one factor combined with other standards. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521; T. J. McDermott, *Types of Seniority Provisions and the Measurement of Ability*, 25 Arbit. J. 101 (1970). The standard of "time served" or "seniority" may involve any or all of the following:

(1) There may be rules on how "seniority" or "time served" is accumulated. In this context, the standards usually attempt to define what kinds of time count for purposes of accumulating seniority. Service in a particular job, department or unit might be necessary to acquire seniority. *Teamsters v. United States*, 431 U.S. at 355, n. 41. Only time served during certain times of a year might be counted for "seniority," as in industries where employment fluctuates dramatically and seasonal employees inflate the employment rolls. A probationary period might exist, so that seniority is not acquired or not measured until after the completion of the probationary period. Finally, time not worked whether because of absence, illness, vacation, union business, suspensions, temporary reassignment or temporary promotions may or may not count toward accumulated seniority. U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective

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Developed Through Collective Bargaining (1941); BNA, *Collective Bargaining Negotiations and Contracts: Basic Patterns—Clause Finder*; CCH, *Union Contract Clauses* (1954). Collectively, the literature on seniority is a testament to the diversity of seniority systems in the United States.

Bargaining Agreements: Administration of Seniority, 5-7 (1972).

(2) There may be rules on how accumulated seniority is lost, whether because of layoff, specified periods of unemployment, failure to report for work, disciplinary discharge, or resignation. *Id.*, 25-31.

(3) There may be rules on how accumulated seniority is reinstated or regained, as, for instance, when an employee is temporarily absent but is reemployed within a specified period of time. *Id.*, 30-31.

(4) There may be rules on how accumulated seniority is transferred, as when an employee transfers from one department or plant to another. *Id.*, 21-24. For example, if an employee is promoted to a supervisor's position that is outside the bargaining unit, his seniority might continue to accumulate; or it might be retained without accumulation; or it might be lost.

(5) Finally, there may be rules on how accumulated seniority is applied to particular employment decisions. These rules might involve the types of employment decisions and job benefits that are governed by the seniority principle: Layoffs, promotions, transfers, shift assignments, overtime, vacations, wage increases, health and pension benefits are examples. The rules might also dictate the manner in which seniority is applied in combination with other standards such as a supervisor's evaluation, a productivity standard, or any number of other possible factors.

Significantly, contrary to the Ninth Circuit's definition, the many different seniority systems generally fall into two basic categories. One is a more rigid type based on strict seniority. Under strict seniority,



the employer must give preference to the more senior employee without regard to any other considerations. The more prevalent contractual provisions provide for "modified seniority." These "modified seniority" provisions are formulated to serve the basic aims of seniority, but not in total derogation of other factors such as skill, productivity or special training. *See, e.g.*: F. Elkouri & E. A. Elkouri, *How Arbitration Works* (3d ed., 1973), 567-571; U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective Bargaining Agreements: Administration of Seniority (1972).

On account of the prevalence and diversity of seniority systems, courts have not entered the thicket of defining "seniority" or imposing rigid rules concerning the operation of seniority. As a result, there is little precedent for the Ninth Circuit's ruling that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases." 585 F.2d at 426. Whatever the general truth of this ruling, the Ninth Circuit omitted any discussion of the important limitations and conditions that serve to define and qualify the operation of seniority.

Simply, time is rarely the sole element of a seniority system. This Court recognized this fact in *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521. In this case, a veteran reemployed at the end of World War II challenged the artificial seniority protection conferred upon a union officer. The Court permitted the use of this "superseniority," stating:

"Barring legislation not here involved, seniority rights derive their scope and significance from

union contracts, confined as they almost exclusively are to unionized industry. [Citation omitted.] There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. *See Williamson & Harris, Trends in Collective Bargaining* 100-102 (1945); Harbison, *Seniority Policies & Procedures as Developed through Collective Bargaining* 1-10 (1941)."

*Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. at 526-27.

*See also, e.g., N.L.R.B. v. Wheland Co.* (6th Cir. 1959), 271 F.2d 122, 124-25.

The Court of Appeals for the District of Columbia, in a unanimous opinion written by then Circuit Judge Burger, also discussed this issue in a case involving dovetailing of seniority lists, *Outland v. Civil Aeronautics Board* (D.C. Cir. 1960), 284 F.2d 224:



*"The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject. [Citations omitted.] Seniority is a matter of negotiation in the first instance and when confronted with the problem, the courts have recognized that factors other than time in service are also important. No general rules can or need be laid down. Of necessity the process of integrating two or more seniority lists calls for compromises in the process of negotiating a result. Here, as we have pointed out, the majority group had the same representation as the minority who now challenge the result. By its very nature the process of integrating the two seniority lists can sometimes lead to consequences unfavorable to some."* [Emphasis added.]

*Outland v. Civil Aeronautics Board* (D.C. Cir. 1960), 284 F.2d at 228.

In summary, federal courts have historically shunned inflexible rules or definitions in seniority system cases. In this context, the Ninth Circuit's misconception of the nature and character of the 45 week provision is illuminated not only by the diversity of seniority systems in the United States, but by the similarity between this provision and other common seniority provisions.

**B. The 45 week provision is virtually indistinguishable from any number of seniority provisions commonly employed in American industry.**

First, the 45 week provision defines the extent of service which is a condition precedent to a higher level of seniority job rights. This provision is similar to any number of probationary periods, eligibility requirements, or other threshold standards which serve the same purpose: creating a tier of job rights distinguishable from those afforded to temporary, part-time or seasonal employees. *See, e.g.: Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521; *Watson v. Teamsters* (5th Cir. 1968), 399 F.2d 875, 877. In *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, *cert. denied* (1978), 436 U.S. 946, a separate tier of seniority based on "job equity"—a form of limited occupational seniority—was created, providing for the similar type of preference as exists in the instant case for "permanent employees."

Second, the provision for minimum service in one calendar year is similar to other common seniority provisions. A probationary period might require thirty days work in a two or three month period. Some probationary periods can last for six months or even a year. CCH, *Union Contract Clauses*, ¶ 51,429 (1954). Also, accumulated seniority credit is often lost because of time off, or even layoff. In this case, the contract provides, in essence, that more than seven weeks unemployment in a calendar year will cause loss of accumulated credit toward permanent status, without loss of other seniority rights.

Finally, seniority may be "measured in a number of ways," *Teamsters v. United States*, 431 U.S. at

355, n. 41, including some ways less related to a simple linear measurement of time than in the brewery system. Businesses with seasonal changes, such as department stores or delivery companies, often provide that seniority cannot be accumulated during those periods when the work force swells due to part-time or seasonal hires. Moreover, the device of superseniority is often used to protect the job security of union officials, without regard to actual time served. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521.

**C. The Ninth Circuit's definition of "seniority system" threatens the flexibility and adaptability of seniority systems.**

1. **The Appellate Court's definition is inconsistent with the principle that under Title VII no type of seniority system is preferred.**

In *Teamsters v. United States*, this Court held that the scope of Section 703(h) was comprehensive and inclusive, including no distinctions between different forms of seniority.

"[T]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. [Citations omitted.] The legislative history contains no suggestion that any one system was preferred." [Emphasis added.]

*Teamsters v. United States*, 431 U.S. at 355, n. 41.

In so holding, this Court recognized the great diversity in seniority systems throughout the nation.

Following *Teamsters*, the Sixth Circuit in *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, cert. denied (1978), 436 U.S. 946 adopted a realistic view of seniority systems. The district court in *Alexander*, in its opinion, stressed that the "job equity" feature of the seniority system perpetuated the present effects of pre-Act discrimination. This "job equity" feature was very similar to the 45 week provision in the instant case. It gave an absolute preference in filling a vacancy to employees with prior satisfactory service in the particular occupation. Under this provision, whenever a vacancy occurred, all employees having any "job equity"—that is, prior satisfactory service in a specific occupation—were given the right to return to the job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. The effect of the "job equity" feature of the seniority system was that an employee with equity would always be preferred over an employee without equity even though the latter was deemed qualified for the position and had longer plant-wide service.

The Sixth Circuit's decision reflects an understanding that a bona fide seniority system need not be based on "strict" seniority:

"Like this Court in *Teamsters*, we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters*, it applies equally to all races and ethnic

groups. To the extent that it “locks” employees into . . . jobs, it does so for all.’

“With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. *The Act, however, speaks not simply of seniority but of a ‘bona fide seniority . . . system.’* A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco’s unique but nonetheless bona fide seniority system.” [Emphasis added; footnotes omitted.]

*Alexander v. Machinists, Aero Lodge No. 735* (1977), 565 F.2d 1364, 1378-1379.

See also, e.g., *Crocker v. Boeing Co. (Vertol Div.)* (E.D.Pa. 1977), 437 F.Supp. 1138.

2. **Seniority systems must be scrutinized in their entirety. No individual component of a seniority system should be singled out for judicial scrutiny under Title VII.**

If individual components of a seniority system are subjected to Title VII attack under the doctrine of *Griggs v. Duke Power Company* (1971), 401 U.S. 424, then the purpose of Section 703(h) and the holding of *Teamsters* will be frustrated. In this case, the Ninth Circuit decided that the 45 week provision is not even part of the overall seniority system. The

Court of Appeals did not pause to consider whether, as a matter of fact, the *entire* seniority system had a bottom-line effect of conferring higher benefits and security on the more senior employees. The appellate court’s approach, if permitted, would open the door to litigation over every single detail and feature of any but the most simple “strict” seniority systems. Every contractual limitation on the operation of the seniority principle—including probationary periods, seniority unit definitions, provisions for loss or modification of seniority, and many others—could be found to have an adverse “impact.” In short, the holding of *Teamsters* would be emasculated. Seniority systems could be attacked piece by piece, although “the sum of the parts” is supposed to be protected under Section 703(h) and *Teamsters*.

- D. **The principle that a seniority system must be bona fide is the only limitation on the immunity conferred by Section 703(h).**

“To be sure, § 703(h) does not immunize all seniority systems. It refers only to ‘bona fide’ systems, and a proviso requires that any differences in treatment not be ‘the result of an intention to discriminate because of race . . . or national origin. . . .’”

*Teamsters v. United States*, 431 U.S. at 353.

As a result of the “bona fide” limitation to Section 703(h), Respondent must show that the entire brewery seniority system either: (i) had its genesis in racial discrimination; (ii) does not apply in an even-handed manner to all races; (iii) is irrational; or (iv) has not been negotiated or maintained free from illegal



purposes. *Teamsters v. United States*, 431 U.S. at 355-56.<sup>15</sup>

This precise formulation of the “bona fide” limitation essentially requires proof of intentional discrimination or the kind of bad faith necessary to prove that a union has breached its duty of fair representation under the National Labor Relations Act. In short, the fact that the “bona fide” standard is the single limitation on Section 703(h) illuminates the Congressional desire to allow employers and unions maximum possible freedom to adopt and adapt seniority systems in accord with the federal law of collective bargaining.

**1. The “bona fide” or good faith limitation on Title VII protections for seniority systems parallels standards developed under the National Labor Relations Act.**

There is no mystery about the reasons for the great diversity among seniority systems. Individual industries and unions have different needs and preferences naturally arising from varying circumstances. Not surprisingly, the collective bargaining process produces an infinite number of solutions to disputes over seniority issues.

The federal courts have intervened to uphold challenges to these bargains only in the clearest cases, preferring instead to allow “a wide range of reasonableness” to a “statutory bargaining representative in serving the unit it represents, subject always to complete

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<sup>15</sup>The “bona fide” limitation to Section 703(h) is not directly involved in the instant case, although many other employment discrimination cases after *Teamsters* have focused on this limitation. See, e.g., *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977), 559 F.2d 310, cert. denied (1978), 434 U.S. 1034. The Court of Appeals in the instant case explicitly stated that: “we are not required to address the question whether the provision was part of an unprotected seniority system, i.e., one that is not bona fide.” 585 F.2d at 428 n. 12.

good faith and honesty of purpose in the exercise of its discretion.” *Ford Motor Co. v. Huffman* (1953), 345 U.S. 330, 338.

In *Ford Motor Co. v. Huffman*, this Court sustained the validity of collective bargaining agreements whereby an employer gave employees seniority credit for pre-employment military service, as well as the credit required by statute for post-employment military service. In reaching its decision, the Court commented on the unique dilemmas inherent in the union’s duty of fair representation and the nature of collective bargaining.

“Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. \* \* \*

“Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service,

whether civil or military, voluntary or involuntary.”  
[Citations omitted.]

*Ford Motor Co. v. Huffman* (1953), 345 U.S.  
at 338-39.

See also, e.g.: *Vaca v. Sipes* (1967), 386 U.S. 171,  
177; *Humphrey v. Moore* (1964), 375 U.S. 335, 349-  
350; *Schick v. N.L.R.B.* (7th Cir. 1969), 409 F.2d  
395, 398-399; *Hardcastle v. Western Greyhound Lines*  
(9th Cir. 1962), 303 F.2d 182, 187-188, cert. denied  
(1962), 371 U.S. 920.<sup>16</sup>

<sup>16</sup>Professor Aaron has provided a descriptive summary of  
the conflicts and disputes that must be resolved during collective  
bargaining. In so doing, Professor Aaron also articulated the  
realistic need for affording to the parties to collective bargaining  
a “wide range of reasonableness” and latitude:

“The role of the union in negotiating a seniority system  
thus becomes a matter of key importance to the member-  
ship. A debate among the members over whether the union  
should seek craft or departmental seniority, as opposed to  
district or plant seniority, for example, is not likely  
to be prompted simply by a desire to consider objec-  
tively the merits of competing theories; more probably,  
it represents a power struggle between the highly-skilled  
and the semi-skilled, between the older members and the  
younger, or between other rival groups within the union.  
Similarly, the union’s role in administering the seniority  
system provides the opportunity for discriminating in favor  
of some individuals and groups and against others, not  
only within its own membership, but also as between  
members and non-members within the bargaining unit repre-  
sented by the union. Whatever the union’s practice may  
be in this regard, it usually is jealous of its own right  
to decide between the conflicting claims of the employees  
whom it represents, and is quick to challenge settlements  
of seniority grievances between individual employees and  
employer representatives to which it has not been a party.

“That portion of the union’s power over employee job  
security which stems from its roles as negotiator and admin-  
istrator of seniority provisions in collective agreements has  
been greatly enhanced by judicial decisions. Although the  
courts consistently have adhered to the principle that the  
union ‘is responsible to, and owes complete loyalty to,  
the interests of all whom it represents,’ they have tempered  
the application of that rather uncompromising formulation

These standards for ascertaining a breach of the duty  
of fair representation are strikingly similar to emerging  
standards for determining whether a seniority system  
is not bona fide.<sup>17</sup>

2. In light of Teamsters holding that bona fide seniority  
systems are protected, Respondent must prove intentional  
discrimination in order to prevail.

The provisions of Section 703(h) represent an excep-  
tion to the general principle of *Griggs v. Duke Power*  
*Co.* (1971), 402 U.S. 424, that good faith and lack  
of discriminatory intent are not sufficient defenses to  
claims of employment bias in violation of Title VII.  
This exception is consistent with the historical treat-  
ment of seniority systems under the National Labor  
Relations Act.

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of the duty by taking into account the realities of industrial  
life. \* \* \*

\* \* \*

“In negotiating seniority provisions . . . the union is  
permitted a considerable latitude of discretion. Subject only  
to the requirement of good faith, it may propose or agree  
to changes in existing seniority rights that are adverse  
and detrimental to the interests of some of the employees  
affected. The same generally is true in respect to adminis-  
tration of the seniority system, . . .”

B. Aaron, “Reflections on the Legal Nature and En-  
forceability of Seniority Rights,” 75 Harv.L.Rev. 1532,  
1535-1536.

<sup>17</sup>Compare *Teamsters v. United States*, 431 U.S. at 355-  
56 and *James v. Stockham Valves & Fittings Co.*, 559 F.2d  
at 352 with the following passage from *Griffin v. International*  
*Union* (4th Cir. 1972), 469 F.2d 181:

“A union must conform its behavior to each of these  
three separate standards. First, it must treat all factions  
and segments of its membership without hostility or discrim-  
ination. Next, the broad discretion of the union in asserting  
the rights of its individual members must be exercised  
in complete good faith and honesty. Finally, the union  
must avoid arbitrary conduct.”

469 F.2d at 183.



The need for a "wide range of reasonableness" compels a reversal of the Ninth Circuit's judgment. If the Section 703(h) exception can be circumvented by highly unpredictable, unprecedented judgments that certain contractual provisions are not "parts" of seniority systems, then the task of parties to collective bargaining is grievously complicated. Employers and unions would not have the flexibility and freedom to devise new resolutions to seniority issues, for fear that their bargain might be nullified as the individual components of seniority compromises are separately subjected to judicial scrutiny.

Federal courts should not undertake to establish inflexible rules for the negotiation and maintenance of seniority systems. The agreements of employers and unions respecting seniority should be presumed to be rational and reasonable solutions to the difficult issues inherent in industrial life. After all, as this Court recognized in *Furnco Construction Company v. Waters* (1978), 57 L.Ed.2d 957, "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 57 L.Ed.2d at 968. Courts should adhere to the long-standing principle that the bargains of employers and unions be tested and examined only to insure that they are the products of good faith. This standard of judicial review should not be discarded in an effort to circumvent *Teamsters v. United States*.

#### IV

#### THE APPELLATE COURT ABUSED ITS AUTHORITY WHEN IT PURPORTED TO ESTABLISH THE LAW OF THE CASE RESPECTING THE 45 WEEK PROVISION'S RELATIONSHIP TO THE BREWERY SENIORITY SYSTEM WITHOUT FACTUAL BASIS AND DESPITE CLEAR ADMISSIONS BY RESPONDENT.

Whether the 45 week provision is part of the brewery industry seniority system is a mixed question of law and fact. Cf. *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977), 559 F.2d 310, 353, cert. denied (1978), 434 U.S. 1034. Respondent's admissions<sup>18</sup> and a careful examination of the collective bargaining agreement suffice to demonstrate that the 45 week

<sup>18</sup>At all times prior to this Court's decision in *Teamsters*, Respondent Bryant proclaimed that he was attacking a seniority system which had the effect of perpetuating the present effects of past discrimination.

Respondent's characterization of the 45 week provision as "seniority" provisions was repeated frequently throughout the verified Second Amended Complaint. [A.16, 18-19.]

On appeal, Respondent contended that "a seniority system like the instant one . . . , though it now may be operating with an even hand, has the effect of perpetuating the discrimination of the past." [Emphasis added.] Opening Brief for Appellant, p. 10. Throughout all briefs filed by all parties on this appeal prior to this Court's decisions in *Teamsters*, there is not the slightest suggestion that the 45 week provision was not part of the seniority system.

Indeed, only after this Court's decision in *Teamsters*, after all other briefs had been filed, and after the employers had no opportunity for reply, did the Respondent first suggest that the 45 week provision might not be a seniority system. Appellant's Supplemental Memorandum of Points and Authorities, p. 3, filed July 17, 1977. Even at this late date, the Respondent conceded that the overall seniority system was immune from attack under Title VII. "Notice we are not calling into question the overall seniority system in the brewery industry; for the system—even though it admittedly perpetuates the discrimination of the past—is beyond attack under this Court's decisions." *Id.*, pages 3-4 [emphasis added].



provision is a seniority provision (See Argument II). In any case, a decision to the contrary is certainly not justified at this stage.

**A. The Court of Appeals purported to foreclose further litigation over the relationship of the 45 week provision to the seniority system.**

The Court of Appeals unambiguously held that as a matter of law the 45 week provision is not part of the seniority system. That the Court of Appeals understood the consequence of this holding is clear from its additional instructions to the district court. Respondent would not be "required to prove any form of intentional discrimination to make out a Title VII violation." 585 F.2d at 427. Thus, it was the apparent intention of the Court to foreclose further litigation over the seniority aspects of this provision.<sup>19</sup>

**B. The Court of Appeals' determination was rendered despite the absence of a factual record.**

The Court of Appeals went to great lengths to theorize that junior employees might acquire permanent status before more senior temporary employees. Even

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<sup>19</sup>Admittedly, the Court of Appeals did state: "For purposes of this appeal, the complaint is construed in the light most favorable to [Respondent] Bryant and its allegations are taken as true." 585 F.2d at 425. However, there are no expressed qualifications on the Court's holding that the 45 week provision is not part of a seniority system. Moreover, the Court remanded "for further proceedings consistent" with its opinion. 585 F.2d at 428.

In the Brief in Opposition to the Petition for Writ of Certiorari, Respondent also claims that "the Court of Appeals had before it all the facts required for decision," while asserting that the Court's "finding" respecting the 45 week provision was based on the "clear and unambiguous terms" of the contract. Respondent's Brief in Opposition, p. 7.

if the job dispatching provisions do not foreclose this theory, there are no facts in the record to support the hypothesis of the Court of Appeals.

The record before the Court of Appeals included only the terms of the collective bargaining agreement. However, the complicated contractual terms must be illuminated by evidence on overriding factual issues, some of which are defined by some of the Ninth Circuit's theories:

(1) *Whether the system, in fact, operates so that employment rights increase as a result of seniority.*

(2) *Whether "unemployment patterns" and "manpower needs" can be manipulated, as the Court of Appeals speculated.*

(3) *Whether the system is administered according to the terms of the contract.*

**C. The Court of Appeals acted improperly in purporting to foreclose further litigation of a factual issue in the context of a 12(b)(6) motion to dismiss.**

The dismissal of a complaint for failure to state a claim upon which relief can be granted is necessarily made before the full development of a factual record. A motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. Accordingly, the judicial task, in the context of a motion to dismiss, is to evaluate the complaint to ascertain whether there is any set of facts which could support the claims, and not whether such facts have been established. Likewise, an appeal from a trial court's granting of a 12(b)(6) motion

is no occasion for making binding determinations of factual questions.<sup>20</sup>

This Court recognized these limitations of the motion to dismiss in *Scheuer v. Rhodes* (1974), 416 U.S. 232. That litigation grew out of a district court's dismissal of civil damage suits brought by the estates of persons killed in the Kent State riots on the theory that the defendants were, as a matter of law, immune from liability for the actions alleged in the complaint. On the narrow issue of the propriety of dismissal at the inception of the litigation, this Court reversed the Court of Appeals' affirmance of the district court's dismissal.

Against this background, the Court confronted the issue of whether the defendants were entitled to absolute immunity, in which case dismissal was proper, or merely qualified immunity, in which case dismissal was premature. See 416 U.S. at 239. Upon determining that the defendants could only lay claim to a qualified immunity, the Court decided further evidence was required and held that the plaintiffs were entitled to have the case proceed to adduce what evidence they could in support of their claims:

<sup>20</sup>For example, the Court of Appeals stated: "[N]o black has ever attained permanent employment status in a California brewery." 585 F.2d at 424. Although there are allegations in the Second Amended Complaint that might be interpreted as making this assertion [A.16-17], there are no facts to support this statement of the Court of Appeals, if it was intended as a conclusion. On remand, the California breweries will have the opportunity and are prepared to demonstrate that blacks have achieved permanent status in the California brewery industry.

"These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here. \* \* \* In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed."

*Scheuer v. Rhodes, supra*, 416 U.S. at 249-50.

In short, any doubts of the Court of Appeals respecting the 45 week provision should not have been forged into a premature partial judgment. The case should have been remanded "without the slightest murmur of a suggestion as to how [the case] should or will come out when the real facts . . . are developed. . . ." *Mann v. Adams Realty Co., Inc.* (5th Cir. 1977), 556 F.2d 288, 297.

See also, e.g.: *Lipsky v. Commonwealth United Corp.* (2d Cir. 1976), 551 F.2d 887; *Braden v. University of Pittsburgh* (3d Cir. 1977), 552 F.2d 948.

In sum, the relationship of the 45 week provision to the overall seniority system has never been briefed, argued or considered in light of a full factual record. The Ninth Circuit erred by summarily denying the seniority character of the brewery system before the trial court had an opportunity to gather the evidence and make the appropriate factual findings. Cf. *Hazelwood School District v. United States* (1977), 433 U.S. 299; *East Texas Motor Freight System, Inc. v. Rodriguez* (1977), 431 U.S. 395; *Fountain v. Filson* (1949), 336 U.S. 681; *Mariash v. Morrill* (2d Cir. 1974), 496 F.2d 1138.

#### CONCLUSION

*Teamsters v. United States* interpreted Section 703(h), reaffirming the congressional decision to place bona fide seniority systems beyond the reach of Title VII. By contrast, the Ninth Circuit's decision purports to establish a rule of law that threatens the flexibility, diversity and adaptability of seniority systems to the different industries throughout the United States, contrary to the explicit congressional purpose embodied in Section 703(h). If the Title VII protection for seniority systems is to be effective, this Court must adopt a realistic definition of seniority systems and safeguard specific components of such systems from attack.

Therefore, the Court should vacate the judgment of the lower Court and rule that the 45 week provision is a part of the overall seniority system.

On remand, the Respondent should be confined to his allegations of intentional discrimination.

Alternatively, at a minimum, the district court should be instructed to disregard the opinion of the Ninth Circuit and to consider the relationship between the 45 week provision and the seniority system based on a full factual record.

Respectfully submitted,

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OCT 8 1979

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 78-1548  
\_\_\_\_\_

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

ABRAM BRYANT,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit  
\_\_\_\_\_

**RESPONDENT'S BRIEF**

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**BRIEF OF RESPONDENT  
ABRAM BRYANT**

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	9
I. Introduction .....	9
A. This Case Raises the Issue of the Meaning of a "Seniority System" under §703(h) of Title VII .....	9
B. Plaintiff's Attack Is Confined to the 45-week Provision .....	10
II. Any Interpretation of §703(h) Must Take into Account the Goal of Congress in Enacting the 1964 Civil Rights Act .....	10
III. The 45-week Rule Is Not Itself a Seniority Provision .....	13
A. Introduction .....	13
B. The Essential Element in Any Seniority System Is the Notion That Employment Rights Should Increase as Length of Service Increases .....	14
C. The 45-week Rule Lacks the Essential Requirement That Rights Increase with Length of Service .....	20
D. The Real Function of the 45-week Rule Is to Define and Maintain the Seasonal Classification Structure in the Brewing Industry .....	25
IV. A Seniority System Includes Provisions Governing the Operation of the Seniority Principle, but Not Those Which, Like the 45-week Requirement, Place Non-Seniority Restrictions on the Application of Seniority .....	27
A. The Court of Appeals Never Held that a Seniority System Includes Only Provisions Stating the Seniority Principle .....	28
B. The "Ground Rules" of Seniority Should be Exempted Under §703(h), Without Immunizing Every Discriminatory Provision Somehow Touched by Seniority Considerations .....	30

## TABLE OF CONTENTS — Continued

	Page
C. Seniority System Provisions State How Seniority Is to Be Calculated and Affirmatively Set Out the Scope of Its Application; Rules Limiting the Application of the Seniority Principle in Favor of Other Policies Are Outside the System .....	33
D. Under the Rhetoric of Non-Interference with Collective Bargaining, Defendants Would Withdraw Title VII Protection from Every Personnel Decision Touched by Seniority .....	37
V. Defendants' View of Congressional Intent Ignores the Congressional Policy of Protecting Civil Rights .....	42
A. Minimizing Government Interference in Labor-Management Relations Is Not a Primary Objective of Title VII, Which "Intrudes" on a Field Where Unregulated Private Activity Created Intolerable Discrimination .....	43
B. Employee Expectations Are Not the Standard for Determining the Scope of the Seniority Exception to Title VII .....	46
C. Defendants Virtually Admit That Their Proposed Standards Could Defeat the Intent of Title VII by Assailing the Ninth Circuit for Subjecting "Any Number" of Non-Seniority Rules to the Requirement of Non-Discrimination .....	47
VI. No Precedents Concerning Seniority Systems Require Eliminating Title VII Protection From the Variety of Provisions Which the Brewers Would Exempt .....	49
A. <i>Teamsters</i> Does Not Answer the Questions Raised by This Case .....	49
B. The Lower-Court Cases Relied on by Defendants Are Mistaken or Inapplicable .....	50
C. Cases Upholding the Legality of Non-Seniority Ranking Provisions Against Non-Civil-Rights Challenges Shed No Light on the Scope of the §703(h) Exemption .....	52
VII. The Proper Disposition of the Case .....	56
CONCLUSION .....	58



## TABLE OF AUTHORITIES

Cases	Page
Accardi v. Pennsylvania Railroad, 383 U.S. 225 (1966) .....	55
Acha v. Beame, 531 F.2d 648 (2nd Cir. 1976) .....	15
Aeronautical Lodge 727 v. Campbell, 337 U.S. 521 (1949) .....	32, 37, 38, 52, 53, 54
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Louisiana v. United States, 380 U.S. 145 (1965) .....	57
Massachusetts v. Feeney, 99 S.Ct. 2282 (1979) .....	53

## TABLE OF AUTHORITIES — Continued

McKinney v. Missouri-Kentucky-Texas Railroad, 357 U.S. 265 (1958) .....	44, 45
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..	11, 57
Oakley v. Louisville & Nashville Railroad, 338 U.S. 278 (1949)	44
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Outland v. Civil Aeronautics Board, 284 F.2d 224 (D.C.Cir. 1960) .....	53, 54
Parson v. Kaiser Alum. & Chem. Co., 575 F.2d 1374 (5th Cir. 1978) .....	36
Parson v. Kaiser Alum. & Chem Co., 583 F.2d 132 (5th Cir. 1978), cert. denied 99 S.Ct. 2417 (1979) .....	24, 33, 36
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Teamsters v. United States, 431 U.S. 324 (1977) .....	Passim
Tilton v. Missouri Pacific Railroad, 376 U.S. 169 (1964) ....	44
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# TABLE OF AUTHORITIES — Continued

## Page

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§703(a) ..... 9

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§703(h) ..... passim

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## Page

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## STATEMENT OF THE CASE

This case tests the sufficiency of a complaint based on the following facts:

Plaintiff Abram Bryant worked as a Temporary Brewer for Defendant Falstaff Brewing Corporation on and off for five years, beginning May 1, 1968 (A 17).<sup>1</sup> In 1973, when he filed his complaint, he was the only Black production worker employed in the brewery industry in the San Francisco Bay Area (A 16). While he worked at Falstaff, four or five other Blacks were employed there; but none were granted Permanent status, and all left (A 17).

Falstaff and the other California brewers have discriminated against Blacks both in hiring and in conditions of employment, together with the Teamster Union locals and joint board which represent brewery employees and refer workers to the employers (A 16, 13-15; R 296-97). This discrimination includes, for example, White employees being granted Permanent status in circumstances in which Bryant was refused such status (A 17; R 294-301), and of White workers with inferior seniority and referral rights being referred for job openings at Defendant Theodore Hamm Company's San Francisco brewery when Bryant should have been referred (A 15, 18; R 296-97).

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<sup>1</sup> Citations to the Appendix filed with the Petition for Certiorari will be indicated by "Pet. App."; "A" refers to the Appendix filed with this Court, while references to the Record below will be prefaced by "R". The Brief of Petitioners California Brewing Association, et al, is referred to as "CBA"; that of Respondent Teamster Unions as "Union"; that of the Equal Employment Advisory Council as "EEAC"; and that of the American Federation of Labor and Congress of Industrial Organizations as "AFL-CIO". The actual collective bargaining agreement was attached as Exhibit A to the Original Complaint and is attached to page 14 of the Record.

Moreover, the collective bargaining agreement for California breweries establishes Temporary and Permanent classifications, among others, in a way that has perpetuated past discrimination<sup>2</sup> and resulted in a permanent workforce that has not included and will not include Black workers (A 16-17). When his appeal was heard, Bryant had earned his livelihood as a brewer for seven years without achieving Permanent status (A 17; R 286, 290-93, 328).

The contractual provisions regarding employee classifications are extremely complex, and they interact with those stating seniority rights. In general, Permanent Employees have the following advantages over Temporary and New Employees:

1. An absolute preference for benefits based on "plant seniority", regardless of true plant seniority (A 30-31, §4 (c));
2. Immunity from layoff while Temporaries are working, and the right to be rehired before any Temporaries (*id.*);
3. Several forms of preference in dispatch to jobs that open up for those out of work (A 37-38, §5 (c));
4. The right, if laid off, to "bump" Temporary or New Employees in other plants in the same half of the state, *i.e.*, the right to take the jobs of the lower-classified workers (A 30, §4 (b));
5. Exclusive rights to Supplemental Unemployment Benefits upon layoff (R 14, §54);
6. Higher wages and vacation pay than Temporaries doing the same work (R 14, §§38, 46, 51, 15(h));
7. Retention of the benefits of their status until unemployed for two consecutive years (the corresponding period for Temporary Employees is one year) (A 29, §4(A) (5)-(6));
8. The exclusive right to retain plant seniority for a two-year period after transferring to another plant,

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<sup>2</sup> Read in its most favorable light, the complaint alleges such past discrimination as taking place both before and after the effective date of the Civil Rights Act of 1964.



and to return to the original plant within the two-year period (A 32-33, §4(e));

9. Exemption from the 30-day probationary period when newly assigned to a particular employer (R 14, §31 (c));
10. A qualified right of shift selection (R 14, §34(e));
11. First choice of vacation times (R 14, §15(k); A 30 §4(c));
12. The earning of more vacation time through more regular employment (R 14, §15(a)-(e));
13. Less rigorous requirements for qualifying for holiday pay (R 14, §14(e));
14. A qualified right to severance pay (R 14, §15(o));
15. Exclusive access to certain veterans' reinstatement and seniority rights (R 14, §7(c); and
16. Priority in assignment of overtime work among Bottlers (A 36, §4(1), ¶(5) (b)).

These are the benefits which no Black worker has achieved in the California brewing industry.

Setting up the broad classes of New, Temporary, Permanent and Apprentice<sup>3</sup> does not answer all questions of relative rights among employees. Thus, *within* each class, plant<sup>4</sup> or industry seniority generally prevails, once that class is eligible for (or vulnerable to) hiring, layoff, shift or vacation choices, etc.

In theory, workers can progress from one class to another. For a non-bottler, such as Temporary Brewer Bryant, to achieve Permanent status, he would have to

<sup>3</sup>For some purposes the contract treats Temporary Bottlers and Non-bottlers, and Permanent Bottlers and Non-bottlers, differently, so there are actually six classes, not just the four listed above. (§4(a)'s reference to five classes, A 27, mistakenly leaves out Permanent Bottlers. Cf. §4(a) ¶¶(1), (2)).

Temporary workers have certain preferences over new workers. Apprentices are in a class by themselves, until completion of the apprenticeship entitles them to Permanent status (A 28).

<sup>4</sup>Plant seniority is not necessarily calculated from date of hire, but from the first date the employee worked at the Plant in his current class (A 31-32).

work 45 weeks in the industry during a single calendar year (A 27, §4(a), ¶(1)). New Employees and Temporaries other than Brewers have comparable progression rules (A 27-29, §4(a)).

In reality, however, neither Bryant nor any other "Temporary" Black worker can invade the ranks of the Permanents. For, under present and foreseeable conditions in the California brewery industry, those who have not made Permanent status cannot get 45 weeks' work in the industry (A 16-17; R 304-5, 310).

The court below never reached the question of whether the all-White nature of the Permanent class of workers, resulting from the combination of past discrimination, the 45-week rule, and the slack demand for brewery labor, constitutes prohibited disparate-impact discrimination. The case is in this Court on the preliminary question of whether the 45-week rule is exempt from such inquiry under §703(h) of the Civil Rights Act, covering disparate treatment through the operation of seniority.

The court below pointed out that, unlike seniority, which accrues automatically while an employee has work, achievement of Permanent status would be haphazard even if conditions permitted some workers to advance to that level. 585 F.2d at 426 (Pet. App. 9-10). Temporaries' seniority determines only their eligibility to be sent out at a given time, not whether they will get a job or jobs long enough to make their 45 weeks when they do happen to be sent out (A 37-39, §5(c)). Accrual of 45 weeks could also be prevented, intentionally or not, by a managerial assignment of vacation time or by a temporary layoff (R 14, §15(k); A 33, §4(h)). Finally, intentional discrimination, such as that suffered by Bryant in job referrals (A 18), could also interfere with the acquisition of Permanent status. Thus some employees could make Permanent status before others senior to them in length of service.

The question before this Court, then, is whether such a classification system was meant to be protected by the legislative exemption of seniority systems in Title VII.

## SUMMARY OF ARGUMENT

Resolution of this case is not difficult if one keeps in mind what it is really about, but that is exactly what the briefs urging reversal lose sight of. This is a civil rights action. In 1964 Congress passed an Act to end once and for all the racial and sexual injustice which had so long plagued American society and had, by the 1960's, reached the point of explosiveness. While the present case involves an exemption from that Act, a restriction on its coverage, we should not forget that what must be construed is the Civil Rights Act of 1964, not an "Act for the Protection of Seniority Systems of 1964".

Abram Bryant alleges that the California brewery industry includes a highly privileged class of Permanent employees, a class that always has been and, for the foreseeable future, will remain, entirely white. The question preventing him from trying that claim is whether the reason for this state of affairs is a Title VII-exempted "seniority system".

Rhetoric about non-interference with collective bargaining provides little guidance, where Congress acted decisively to dismantle the segregated work forces which unregulated collective bargaining too often left intact. The rule that is applicable is that exemptions from legislation remedying social wrongs are narrowly construed.

The court of appeal considered both (1) whether the 45-week rule for gaining Permanent status is itself a seniority system and (2) since it is not, whether it is an ancillary part of the system that does use industry and plant seniority for a number of key purposes.

The term "seniority" is used almost universally as the court of appeal defined it: a measure of standing to win job benefits that grows with increasing length of service in a defined unit (*e.g.*, department, plant, or industry). (Defendants are wrong, however, in stating that the court held that every *part* of a seniority system must conform to this "fundamental component" of such systems.)

Workers have fought for use of the seniority principle as an objective standard that guards against favoritism and discrimination; permits them to know where they stand as to job security and chances for promotion; assures them increasing security as they get older; and satisfies an equitable notion that long years of service should produce greater benefits and privileges. These were the goals that Congress wanted to avoid interfering with as it finally leveled its guns at employment discrimination.

The 45-week rule neither shares the essential characteristics of seniority nor promotes the values to which Congress deferred in enacting § 703(h). Rather than *ranking* workers according to increasing length of service, the rule is, as the court of appeal found, an "all-or-nothing proposition." Rather than providing an objective standard for allocation of rights, it is peculiarly susceptible to manipulation by keeping a worker unemployed for the few weeks necessary to cause him or her to have to start from scratch again January 1.

The 45-week rule does have a function. In a seasonal industry it makes experienced "Temporaries" available, while excluding them from many of the benefits granted Permanent workers. Thus the breweries pay for those benefits for fewer workers, while those who make Permanent "share the pot" with fewer co-workers.

The court below passed no judgment on such arrangements, except to hold that they do not benefit from the anti-discrimination exemption which Congress gave seniority systems.

Defendants also argue that the 45-week rule is *part* of a seniority system since, like a rule designating the unit within which seniority will be calculated, it determines who will be placed on a particular seniority list. Under tests proposed by Defendants for thus determining the *scope* of seniority systems, non-seniority factors, like experience requirements and ability tests, would stand even if they have a discriminatory impact not justified by business necessity. So would probationary periods that determine, among other things, when a worker is entitled to seniority protection. Yet where similar provisions do not



happen to touch the operation of seniority, they would be subject to Title VII.

It requires no rule of narrow construction to recognize that what Congress wanted to pass over with the inclusion of § 703(h) was the operation of the seniority principle, not everything with which that principle interacts in a collective bargaining agreement. Rules that define seniority and how it is calculated (including the unit in which it accrues, how it can be lost, etc.) or which affirmatively state to which decisions it applies, should be considered part of the system. Rules which limit the application of the seniority principle by excluding some workers from its protection, or by accommodating non-seniority consideration in personnel decisions, should be subject to well-established Title VII tests, if they are alleged to be discriminatory.

This approach would protect the objective and equitable standard for determining employee preference that seniority represents and protect the wide variety of means evolved for applying the seniority principle. But there is no need to legalize discrimination where other considerations (e.g., attempts to test ability) encroach on the application of seniority.

Precedents which supposedly counsel against carefully defining "seniority system" only hold that various legal duties do not prohibit using non-seniority factors in promotion and lay-off systems based largely on seniority.

Defendants contend that the case should be remanded to see whether, as a matter of fact, Permanent status is awarded only to the most senior Temporaries. Given the 45-week rule, there is nothing to guarantee that length of service will control, and so, even if it happened that the more senior Temporaries did become Permanent (which they do not), there is no basis for believing that that situation would continue. Without that predictability, there is no real "seniority system" at work.

The case should therefore be remanded to give Bryant a chance to prove his complaint of discriminatory treatment and to show that the 45-week rule serves to perpetuate the effects of the discriminatory hiring practices of the past.

## ARGUMENT

### I INTRODUCTION

#### A. This Case Raises the Issue of the Meaning of a "Seniority System" under § 703(h) of Title VII.

This case comes before the Court in the wake of its decision in *Teamsters v. U.S.*, 431 U.S. 324 (1977). There the Court indicated the protection to be afforded a bona fide seniority system by § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2(h) (1964), and went on to provide guidelines for determining a system's bona fides. *Teamsters* did not raise and this Court therefore did not consider the issue of *what is a seniority system as that term is used in § 703(h)*.

That is the issue tendered here. In the California brewing industry Permanent status is a function, not of overall length of service in classification, plant, or industry, but of whether, in the space of any one calendar year, an employee is able to get in 45 weeks of work. The question is: Does the 45-week rule fall within the § 703(h) definition of a "seniority system"?

If it does not, then Plaintiff Bryant is entitled to prove that because the 45-week rule serves to perpetuate the effects of the discriminatory hiring practices of the past, it should be struck down as a violation of §§ 703(a) and (c) of the Act.

What the Court has before it, therefore, is a problem of definition. The problem is complicated by the fact that prior to *Teamsters* the legal consequences of using the term "seniority" and "seniority system" loosely were not well understood. And people at times did use them loosely. Commentators, courts, and even counsel for Plaintiff Bryant (as Defendants are fond of pointing out) were not as precise as one who looks back from the vantage point of *Teamsters* would have hoped. At the time such rigor was not required, but that is no longer true. *Teamsters* put a bite in the § 703(h) exception, and so, from now on, care must be taken so that when "seniority" or "seniority sys-



tem" is used, that is what is meant, not simply something which touches upon or is affected by a seniority system.

**B. Plaintiff's Attack Is Confined to the 45-week Provision.**

Before turning to the underlying area of disagreement — the meaning of "seniority" and "seniority system" — it would be well to clear away some unnecessary confusion.

Contrary to what the briefs of Defendants and their Amici suggest, Plaintiff does *not* contend that there is anything illegal in classifying brewers and bottlers as "Permanent" and "Temporary". Nor does he contend that there is anything wrong with affording Permanent Employees contractual bumping and referral rights which they may exercise against Temporaries either on the job or at the union hall. The only thing he attacks is the *method by which one achieves this preferred status* — the requirement that one work 45 weeks in a single calendar year.

It is important to bear this in mind because the specter which Defendants and their Amici raise of the destruction of the entire structure of job relationships in the California brewing Industry is just that - a specter - and nothing more. Should Plaintiff Bryant prevail, there will still be Permanent and Temporary employees, and the Permanents will still have the right to bump the Temporaries. The difference will be that the rules for moving from Temporary to Permanent will be modified to eliminate the 45-week provision and allow the district court, after a full factual presentation of relevant data, to exercise its equitable discretion in fashioning a substitute which will allow Plaintiff and his class their rightful place in the industry classification structure. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-79 (1976).

**II ANY INTERPRETATION OF §703(h) MUST TAKE INTO ACCOUNT THE GOAL OF CONGRESS IN ENACTING THE 1964 CIVIL RIGHTS ACT.**

The starting point for any definition is an understanding of the pre-eminent forces which were at work in the creation of the Civil Rights Act of 1964. The legislation

found its moral imperative in the elimination of the racial and sexual injustice which had for so long haunted American society. Its practical impetus was the growing social turmoil brought on by the failure to recognize that moral imperative. The two blended in the realization that — in years to come — not only Black but White, not only women but men would benefit from a society which had eschewed racial and sexual privilege.<sup>5</sup>

Because discrimination was a pervasive fact of American life, the Civil Rights Act cut a wide swath through the social, political, and economic relationships which make up society; because discrimination was deep seated, the Act sought a fundamental reordering of those relationships. Yet Congress recognized that any legislation with so wide ranging and fundamental a goal was bound to conflict with other policies abroad in society. Not everything was to fall before the sword of absolute sexual and racial equality; the guiding principle was to be *equality of opportunity*, rather than absolute equality now. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). Equality of opportunity recognized that the complete elimination of traditional workplace values like merit and seniority would, in the end, be more disruptive than conducive to the achievement of racial harmony, both on the job and in society at large.

Under the principle of equal opportunity, intergration is not to outstrip the availability of qualified minority workers. Workers, both black and white, women and men, are to be judged by criteria which fairly distinguish their qualifications. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). With seniority the problem is more complex: The feeling that employment rights should increase with service has a long and honorable history; few would condemn it as nothing more than a vehicle for racism and sexism. Yet there is an inevitable tension between seniority, on the one hand, and the elimination of privilege born

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<sup>5</sup>See, e.g., 110 Cong. Rec. 6562 (1964) (remarks of Sen. Kuchel); *id.* at 6547 (remarks of Sen. Humphrey); H.R. Rep. No. 914, 88th Cong. 1st Sess. (1963); 2 U.S. Code, Cong. & Ad. News 2393 (1964).

of discrimination, on the other. A White worker whose employer has discriminated in hiring or promotion will, even under the best of seniority provisions, enjoy privileges which he does not entirely deserve. See *Teamsters v. U.S.*, 431 U.S. at 349-50. And so the tension is there: How to reward long service without unduly perpetuating the discrimination of the past.

In working out a definition of "seniority system" under §703(h), that tension is of critical importance; for it means that *the looser the definition, the slower and more arduous will be the path to an integrated work force*. Given this state of affairs the definitional process should be one which shields what is essential and valuable but does not protect that which is unnecessary, superfluous or unrelated to the purpose of seniority.

There is nothing new to such an approach. It is a recognized rule of construction that exceptions to remedial legislation are to be narrowly construed. *Piedmont & Northern R. Co. v. I.C.C.*, 286 U.S. 299, 311-12 (1932); *Spokane & Inland R. Co. v. United States*, 241 U.S. 344, 350 (1916); *United States v. Dickson*, 40 U.S. (15 Pet.) 91, 107 (1841) (Storey, J.); *Teamsters v. U.S.*, *supra*, 431 U.S. at 381 (Marshall, J., concurring and dissenting). In *A.H. Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945), this Court held that the purpose of the Fair Labor Standards Act was:

"...to extend the frontiers of social progress"...Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

The humanitarian and remedial urgency of Title VII is beyond question:

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight

of the Negro in our economy."...Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs."...Because of automation the number of such jobs was rapidly decreasing....As a consequence "the relative position of the Negro worker [was] steadily worsening..." Congress considered this a serious social problem. As Senator Clark told the Senate:

"The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why this bill should pass."...

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future."...

*United Steelworkers v. Weber*, 99 S. Ct. 2721, 2727 (1979) (citations omitted).

Given this goal, and given the moral and practical imperatives which brought the Civil Rights Act into being, there is every reason to abide the canon which calls for the narrow construction of exceptions like that found in §703(h).

### III. THE 45-WEEK RULE IS NOT ITSELF A SENIORITY PROVISION.

#### A. Introduction.

If this were a case where, say, an age or education requirement was being used as "a condition precedent to a higher level of seniority job rights" (CBA 31), then we could immediately consider the scope of the term "seniority system" as used in §703(h) and whether that term should include such a "seniority acquisition rule" (EEAC 31). However, this case is complicated by the fact that the 45-week rule *itself* has something to do with "time



worked" and thus could conceivably be a seniority provision in its own right.

Unlike the court of appeal, Defendants and their Amici consistently confuse the two questions: (1) whether the 45-week provision is itself a seniority system, and (2) if not, whether it is protected under §703(h) because, as a "condition precedent" to placement on the Permanent workers' seniority list, it is a *component* of a seniority system.

The court of appeal answered both, and we will do likewise. Here we consider what "seniority" means and whether the 45-week rule is itself a seniority provision; later we turn to the question of which seniority-related rules should be considered part of the seniority system and which would not (*Infra*, Part IV).

**B. The Essential Element in Any Seniority System Is the Notion That Employment Rights Should Increase as Length of Service Increases.**

The task of separating what is essential to the concept of seniority from that which is superfluous is not a simple one. Collective bargaining agreements are a complex blend of the varied and often conflicting purposes which labor and management bring to the negotiating table. That being so, it is important that inquiry be directed to the real purpose of seniority, to the reason why Congress admitted it into Title VII despite its unwanted side effect of slowing the achievement of full integration of the work place.

Labor has historically fought for seniority for two reasons: there is, first of all, the "rather general feeling that a worker who has spent many years on his job has some stake in that job and in the business of which it is a part". Selznick, *Law, Society and Industrial Justice* 203 (1969). This principle has its roots in notions of fairness and fair play which predate and transcend collective bargaining. Even employers whose workers are not unionized pay deference to it. Speed & Bambrick, *Seniority Systems in Nonunionized Companies*, National Industrial Conference Board, Studies in Personnel Policy No. 110 (1950).

Equally important is the need for an objective and predictable rule in allocating job preference among employees. "A prime motivating force of unionism is the desire to correct arbitrariness and discrimination in promotions, layoffs, recalls, and assignment of duties." Ranking workers by seniority provides "a rule of law", rather than of men, for making such decisions. Sayles, *Seniority: An Internal Union Problem*, 30 Harv. Bus. Rev. 55 (1952); See also Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*. 82 Harv. L. Rev. 1598, 1604-5 (1969). In particular, discrimination against active trade unionists is avoided. Department of Industrial Relations, Queens University (Ontario), *Bulletin #12: Seniority* 1 (1948). Use of a known, objective standard minimizes the discontent of workers who do not benefit from a particular personnel decision, while reassuring them that as they accumulate seniority, they, too, will eventually benefit from the policy. Golden & Ruttenberg, *The Dynamics of Industrial Democracy*, 128-31 (1942). Finally,

Seniority does let the workers know where they stand and gives them some certainty about their fate. By knowing their places on the seniority lists, they can pretty well establish their chances of being promoted or of being laid-off during depressions.

United Steel Workers, I *Principles and Problems of Seniority*, 16 (1949).

See also U.S. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Seniority in Promotion and Transfer Provisions* 1 (Bulletin 1425-11) (1970); *Acha v. Beame*, 531 F. 2d 648, 657 (2d Cir. 1976) (Kaufman, C.J., concurring).

These functions of giving workers an ordinal ranking, and doing so by an objective, non-manipulatable standard, can be fulfilled by seniority only if that concept is understood as the incremental build-up of preferential status over time. And that is how the concept has always been understood. Commentators writing just as seniority



was becoming a widespread phenomenon in the industrial world spoke of it in that manner:

...seniority is a rule providing that employers promote, lay off and re-employ labor, according to *length of previous service*."

Christenson, *Seniority Rights Under Labor Union Working Agreements*, 11 Temp. L.Q. 335 (1937) (emphasis supplied).

... the principle of seniority — a principle under which *length of employment* determines order of layoffs, rehiring and advancements.

*Seniority Rights in Labor Relations*, 47 Yale L.J. 73, 74 (1937) (emphasis supplied)

Nor has the description changed over the years:

The term [seniority] refers to *length of service* with the employer or in some division of an enterprise.

BNA, *Collective Bargaining Contracts, Techniques of Negotiation and Administration with Topical Classification of Clauses* 488 (1941) (emphasis supplied).<sup>6</sup>

And that is what the lay person understands by the term:

Seniority...3. The status secured by *length of service* for a company, to which certain rights, as promotion, attach.

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<sup>6</sup> There are numerous other authorities to the same effect. See the following *Legal Articles and Texts*: Aaron, *The Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962); Note, *Title VII, Seniority, Discrimination and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1263 (1967); Dangel & Scriber, *The Law of Labor Unions* §15 (1941); *Industrial Relations Dictionaries: Roberts' Dictionary of Industrial Relations*, (1971), entries under "Length of Service" (p. 287), "Seniority" (p. 493), "Seniority Clauses" (p. 494), "Seniority List" (*id.*) "Seniority Policy" (*id.*), "Seniority Provisions" (*id.*), "Seniority Rights" (*id.*), "Seniority System" (*id.*); *Industrial Relations Articles and Texts*: Lapp, *How to Handle Problems of Seniority* 1-2, (1946); McCaffrey, *Development and Administration of Seniority Provisions*, Proceedings of NYU 2nd Annual Conference on Labor 131, 132 (1949); Meyers, *The Analytic Meaning of Seniority*, Industrial Relations Research Association, Proceedings of Eighteenth Annual Meeting 194 (1965).

*Webster's New International Dictionary* (2nd Ed., 1953) (Only applicable definition, emphasis supplied).

That this is what Congress likewise had in mind is born out by the three documents which Senator Clark put into the *Congressional Record* and which have come to constitute the primary source in ascertaining Congressional intent in this area. See, *Teamsters v. U.S.*, 431 U.S. at 350-51, 386; *Franks v. Bowman Transportation Co.*, 424 U.S. at 759-61. Each speaks as though it were understood that job rights should increase with service. The Clark-Case Interpretative Memorandum contains the assurance that the law would give minorities no security "at the expense of white workers *hired earlier*." 110 Cong. Rec. 7213 (1964) (emphasis supplied). The Department of Justice Memorandum refers to "white workers [who] had *more seniority* than Negroes." *Id.* at 7207 (emphasis supplied). The prepared responses to questions suggested by Senator Dirksen contain the assurance that the "last hired, first-fired" consequence of seniority rights would remain. *Id.* at 7217.<sup>7</sup>

Nowhere in the Congressional history is there any suggestion that seniority was something other than rights which accumulated with service. Nor is there anything to indicate that aspects of collective bargaining which do not have as their goal the protection of such rights were to be exempted as "seniority systems".

The only difference between early seniority systems and those found nowadays is that the manner and method of computing length of service have become more elaborate:

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<sup>7</sup> In a similar vein, this Court in *Teamsters* spoke of protecting "differences in treatment among employees as flowed from a bona fide seniority system that allowed for the full exercise of seniority *accumulated* before the effective date of the Act", 431 U.S. at 352 (emphasis supplied). The sense of "accumulation" is one of increase over time, not of sudden, all-or-nothing leaps in status.

In the most general terms, seniority is defined as *length of service* ... Seniority usually is broken or eliminated by such events as discharge for cause, layoffs of very long duration (say, over a year), retirement, or unauthorized leaves of absence. The definition of seniority is completed by reference to the "area" of seniority or seniority "unit".

Wickersham & Kienast, *The Practice of Collective Bargaining* 430-31 (1972) (emphasis supplied).

Defendants and their Amici make much of this variety in seeking to establish that the court of appeals was wrong when it found that the 45-week provision lacked the essential element of a seniority system: "that employment rights should increase as length of an employee's service increases". 585 F.2d at 426 (Pet. App. 9). They would have this Court believe that, because seniority has become so varied, length of service has been eliminated or diluted as a necessary component.

Neither Plaintiff Bryant nor the Ninth Circuit denies that seniority systems are varied and complex. But to argue that, because they are, they have lost their defining characteristic is not only wrong; it is contrary to the very authorities upon which Defendant brewers rely.

They cite Footnote 41 to *Teamsters v. U.S. supra*, 431 U.S. at 355, (see CBA 26, 31, 32) and quote the late Benjamin Aaron's description of seniority provisions as having "almost infinite variety", ranging from "absolute rigidity to great flexibility, and from relative simplicity to extreme complexity", Aaron, *supra*, 75 Harv. L. Rev. at 1534. What they neglect to point out is that the lead paragraph immediately preceeding their quotation reads:

#### THE NATURE OF SENIORITY RIGHTS

Seniority is a system of employment preference based on *length of service*; employees with the *longest service* are given the greatest job security and the best opportunity for advancement. Neither by law nor by custom has seniority become an essential ingredient of the employment relationship. The employer who operates an unorganized

plant is free to ignore relative length of service in laying off, recalling, promoting, or assigning his employees, and he usually does so. Yet the seniority *principle* is so important that it is embodied in virtually every collective agreement. It is thus the product of collective bargaining; it owes its very existence to the collective agreement.

*Id.* (emphasis supplied, footnotes omitted).

Obviously Professor Aaron, in speaking of "infinite variety" and "extreme complexity", is talking about the same thing Professor George Cooper and Richard Sobol describe when they say:

Seniority may be measured by *total length of employment* with the employer ("employment", "mill", or "plant" seniority), *length or service in a department*, ("departmental seniority"), *length of service* in a line of progression ("progression line" seniority), or *length of service* in a job ("job" seniority). Different measures of seniority sometimes are used in the same plant for different purposes. *The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service*, with preference accorded to the senior worker. Similarly, construction craft unions, which control the allocation of local work in their craft, have adopted referral rules based on *length of service*.

Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1602 (emphasis supplied, footnotes omitted).

In its Footnote 41 to *Teamsters v. U.S. supra*, this Court cited the very pages of the Aaron and the Cooper and Sobol articles which emphasize the essential role of length of service in every seniority system, regardless of its complexity.<sup>8</sup>

<sup>8</sup>Defendants, in their attack on the court of appeals' decision, incorrectly criticize the court for overlooking the complexity and variety of seniority systems. Not only did the court cite the very page of Professor Aaron's article which refers to "infinite variety", but it went on to describe the complex combinations of seniority measurements which are often used in one labor agreement. 585 F.2d at 426 and Fn. 10 thereto (Pet. App. 9).



What Defendants have failed to appreciate — and what the above quotation from Cooper and Sobol makes so clear — is that the variety and complexity of seniority systems are the result of the *elaboration*, not the elimination, of the primary notion that rights should accumulate with service. The court of appeals was therefore quite correct in saying that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases". 585 F.2d at 426 (Pet App. 9).<sup>9</sup>

**C. The 45-week Rule Lacks the Essential Requirement That Rights Increase with Length of Service.**

Having established length of service as the central component in any seniority system, the court of appeals turned to the 45-week rule and first took up the question of whether that rule — standing alone — constitutes a seniority system.

The court held that it does not because it fails to provide for incremental increases in employment rights or benefits based on length of service. 585 F. 2d at 427 (Pet. App. 9). The court explained that the happenstance of working 45 weeks in a 52-week span was *independent* both of total time worked and overall length of employment:

Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees....Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year.

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<sup>9</sup>By focusing on length of service as an essential element of seniority, we do not mean to imply that that element, *standing alone*, constitutes the definition of a "seniority system", only that any definition of seniority system must, *at a minimum*, contain that element. In Part IV of this brief we consider what else is required for such a definition.

...Once an employee has worked 45 weeks in any calendar year, he is classified as a permanent employee. Until that time, it makes no difference how long a person has been employed by a department, plant, company, or industry, or how close he may have come to satisfying the 45-week requirement.

*Id.* at 426-27 (Pet. App. 9-10).

What this means is that the requirement is an "all-or-nothing proposition" (*id.* at 427, Pet. App. 10), while true seniority allows for the gradual accumulation of rights and benefits based on service. Here one either makes Permanent or one does not. If not, then the board is wiped clean and, regardless of how long or faithfully he has worked, he must begin all over ... the day after New Year's.

It would be hard to find a more graphic illustration of this phenomenon than Plaintiff's own situation. For seven years Abram Bryant worked, with only intermittent breaks in service, in the California brewing industry (R. 286, 290-93). Over those years his job was his primary source of income (R. 290-93, 328). Yet, during those seven years, he was never allowed to build up the required 45 weeks of service in one calendar year. He therefore remains, despite his years application, a Temporary employee, no closer to becoming a Permanent than the day he was hired.

As a seniority provision, the 45-week requirement is deficient in another respect. Historically, the problem for workers was not so much one of securing recognition for the notion of seniority; even non-union employers acknowledged its legitimacy. The real problem was seeing to it that rules were developed to give seniority a precise and measurable shape. Only in that way could it be insulated from manipulation by either employer or union, and thereby provide "all employees with a basis for predicting their future employment positions". Cooper and Sobol, *supra*, 82 Harv. L. Rev. at 1605.

The 45-week provision is anything but "predictable".



The court of appeals correctly pointed out:

... an employee's chances of satisfying the [45-week] provision automatically terminate at the end of each year. This aspect of the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status.

585 F. 2d at 427 (Pet. App. 11).

This potential for abuse is evident. The shifting of production from one plant to another, the occurrence of illness or injury, the particular timing of a layoff or a transfer or a re-assignment — any of these serves to halt an imminent promotion. These risks are not unknown to true seniority systems, but in those systems (where the all-or-nothing phenomenon is not present) they seldom, if ever, strip the worker of the time he has accumulated and return him to the beginning where he must once again face all of the same risks. Let us be frank about the matter: The fact that Temporaries are able to do the work of Permanents but are paid less and do not accrue fringe benefits such as supplementary unemployment pay, retirement, severance pay, medical and dental coverage, is a *very strong incentive* to an employer to see to it that the Permanent force remains small. In any sizeable operation there is always enough "free play" in the scheduling of production and in the timing of layoffs and re-assignments to allow for manipulation. Along with this natural, if not altogether worthy, managerial incentive, there is the Union's equally natural inclination to limit the number of Permanents, so as to reward the "old-timers" by seeing to it that part of a finite wage and benefit package is divided up among the few who have come to control the union and its bargaining stance.

It is true that in many promotional systems accrued seniority is lost upon transfer from one position or line of progression to another. Those systems differ from the 45-week requirement because, under them, the failure of

a worker to gain a promotion does not deprive him of his accumulated rights and force him to begin anew. His accumulated seniority is still there to be utilized in seeking the next available opening. Furthermore, any loss of seniority in such a situation is voluntary in the sense that the worker decides whether or not to transfer or bid. And so, while seniority systems cannot entirely rid themselves of the potential for manipulation, no seniority system encourages and maximizes that danger like the 45-week requirement.

Defendants and their Amici also suggest that the 45-week provision should be protected because it furnishes a "rough" measure of length of service. They point out that since Temporaries do build up legitimate plant seniority within their classification, they will be *more likely* than less senior Temporaries to get in their 45 weeks.

The problem with this argument is that accrued plant seniority is not enough. The employee must also work 45 weeks in one year. Regardless of how well he does in accumulating plant seniority, he is nevertheless subject to the added risk that, because of a change in the scheduling of production or in the timing of a layoff, he will be cut off before attaining his 45 weeks and returned to "square one" where he must begin again.

By making promotion turn, not on actual length of service, but on a mere *increase in probability* that length of service will control, the argument serves to dilute the fundamental requirement that benefits should grow with service and further deprive employees of "a basis for predicting their employment position". Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1605.

Related to this last argument is the suggestion by Defendants that the case should be remanded to the district court to determine whether, *as a factual matter*, Temporaries do achieve Permanent status in order of their length of service. If it worked out that they did, then, according to Defendants, the system would be legitimized as a "seniority system".

Besides being at odds with the reality of the Califor-

nia brewing industry (see R. 310), such a contention stands on weak theoretical grounds. Suppose that, instead of the 45-week provision, promotion to Permanent was based solely on "ability". There is, no doubt, a rough correlation between ability and length of service, since the longer one works, the more adept he tends to become. Does that mean that, in any case where the "ability" standard is under attack for its disparate impact, the employer should be allowed to prove as a §703(h) defense that promotions happen to come in order of length of service? We doubt it, but that is exactly where Defendants' argument leads.

There is another more serious problem with the argument. Even if it happened to work out that promotions came in order of service, there is nothing to guarantee that such a situation would continue, just as there is nothing to guarantee that because one has tossed "heads" five times in a row, he will toss it the next time. The only way to insure that length of service will continue to govern promotion is to have a contractual provision which so provides. The absence of such a provision is why the court of appeals did have a sufficient record to conclude that the operation of the 45-week rule should not be considered to be inevitably governed by seniority.

This is not the first case since *Teamsters v. U.S.* where the question of what is and is not protected by §703(h) has arisen. Most involved claims that a particular rule, while not itself a measure of length of service, was nevertheless entitled to protection as a part of a seniority system. These are considered in the next section (*infra*, Part IV). But two cases do address the issue of whether the 45-week provision is itself a way of measuring length of service. In *Parson v. Kaiser Alum. & Chem. Co.*, 583 F.2d 132 (5th Cir. 1978), *cert. denied* 99 S. Ct 2417 (1979), promotions within a department were based, quite legitimately, on plant seniority. The problem was that if one sought promotion to a job in another department, he had to spend at least ten days in the lowest job in the new department; only then could he use his plant seniority to bid for promotion. As a result, an employee who wanted a better job in a new department had:

... to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten day waiting period.

*Id.* at 133.

The court held that the ten-day waiting period was not a measure of seniority even though it, like the 45-week provision, required the performance of a specified amount of work over a pre-ordained period of time as a condition for advancement.

Similarly in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied* 99 S. Ct. 1020 (1979), the court found that a one-year waiting period before advancement could occur in a particular line of progression — again a rule conditioning promotion on a specified amount of work in a pre-ordained time period — was not a measure of seniority and therefore had to stand up to scrutiny as a business necessity. *Id.* at 1194-98.

#### **D. The Real Function of the 45-week Rule Is to Define and Maintain the Seasonal Classification Structure in the Brewing Industry.**

When all is said and done, the 45-week provision is not a rule of seniority, *it is a way of defining a classification structure.*

At first blush it may seem odd for a classification to be defined in terms of time worked. In a seasonal industry, however, where the most significant difference among workers is not the kind of work they do (everyone does pretty much the same thing) or the skill they possess (that is mastered during the probationary period), the overriding difference is whether the employee works year round or seasonally. The job titles themselves emphasize this difference: One moves from *Temporary Brewer* to *Permanent Brewer*, from *Temporary Bottler* to *Permanent Bottler*. There is nothing to call attention to differences in work performed as, for example, in the machinist trade, where progression is from Helper, to Specialist, to Jour-



neyman, to Tool and Die Machinist. One searches the collective bargaining agreement in vain for a description of any difference in skill, training, or work performed which differentiates Temporary from Permanent. All do the same work. The only classification definition to be found is this:

A permanent employee (other than Bottlers) is any employee ... who ... has completed forty-five weeks of employment under this Agreement in one calendar year as an employee of the brewing industry in this State. Temporary Bottlers shall be entitled to the full rate and permanent status after they have worked 1600 hours in a calendar year.

(A 27).

It is not at all unusual for seasonal industries to distinguish one job from another solely on the basis of time worked.<sup>10</sup> Slichter, Healy and Livernash in their book, *The Impact of Collective Bargaining on Management* (1960), not only describe the temporary/permanent classification structure which operates in seasonal industries, but explain the forces at work to create the structure:

In the seasonal industries, such as the needle trades, millinery, and shoes, there is some reason to believe that the permanent employees prefer to maintain a longer probationary or temporary employee period. This is consistent with their job security interest. Since probationers and temporary employees are laid off first because they lack seniority, it enables the permanent or seniority job-holders to share work at a higher number of hours per week. If the period necessary to acquire seniority were less, more people would be entitled to share the available work, and the hours per person would be less. However, the desire of the regulars to secure for themselves the overtime opportunities in good times occasionally makes them

<sup>10</sup>The AFL-CIO brief recognizes the close relationship of the temporary/permanent classification structure to seasonal employment (AFL-CIO 28-34 & App.); but it, of course, pulls up short of admitting that it is a classification system and not a seniority provision.

want to limit the number of temporary employees.

*Id.* at 124.

To this should be added the important management interest in maintaining a pool of lower-paid workers who are not entitled to vacations, sick leave, pensions, supplementary unemployment pay or other costly and troublesome fringe benefits. BNA, *Collective Bargaining Contracts: Techniques of Negotiation and Administration With Topical Classification of Clauses* 386-92 (1941).

It is obvious that there are important financial interests on both sides which encourage the creation of temporary/permanent structures in seasonal industries and that those interests differ materially from the notion that, as one works, he should build up rights in his job. Instead what we have is the impetus on the part of established regulars to monopolize certain scarce privileges (off season work, overtime, pensions, etc.) and the impetus on the part of management to minimize labor costs. The result is the creation of a pool of Temporary workers who are confined to that category by restrictive rules which, rather than rewarding perseverance, serve primarily to maintain a low-cost, seasonal labor supply.

The creation and maintenance of such a pool, while not illegal in itself, is certainly not entitled to the protection of §703(h). It is a classification device, not a part of seniority.

IV. A SENIORITY SYSTEM INCLUDES PROVISIONS GOVERNING THE OPERATION OF THE SENIORITY PRINCIPLE, BUT NOT THOSE WHICH, LIKE THE 45-WEEK REQUIREMENT, PLACE NON-SENIORITY RESTRICTIONS ON THE APPLICATION OF SENIORITY.

The fact that the 45-week rule is not a seniority provision does not end the inquiry; for, as the court of appeals recognized, it could be argued that even though the rule is not *itself* a seniority system, it might nevertheless be entitled to §703(h) protection as a *component* of an overall system. It is to that possibility that we now turn.



**A. The Court of Appeals Never Held that a Seniority System Includes Only Provisions Stating the Seniority Principle.**

Defendants mistakenly treat the bulk of the Ninth Circuit opinion as defining what contractual provisions can be considered part of a seniority system, rather than as explaining what must be "the fundamental component" of any such system. Thus the Union writes,

There is surely no indication that Congress meant for the Courts, in Title VII cases, to strike down existing systems of seniority whenever it appeared that accumulated length of service alone was not the inflexible basis for determining seniority rights.

Union 27; see also AFL-CIO 20, EEAC 19-20.

The Union also accuses the court below of the dissection of established contractual systems for the purpose of determining whether each component, taken by itself, expresses the requisite fidelity to length of service.

*Id.* 40; see also CBA 34.

Statements in the court's opinion about seniority accruing automatically and being much more immune to discriminatory application than the 45-week rule are treated as tests by which every provision claimed to be part of a seniority system is to be evaluated (*e.g.*, Union 44, EEAC 15, 27, 34). Each brief supporting reversal, therefore, contains long passages illustrating the variety of seniority systems in existence and showing the ways seniority can be lost (through, *e.g.*, transfers or breaks in service), rather than accruing automatically.

This entire line of argument is aimed at a straw man. The bulk of the opinion of the court below was devoted to the question considered in the previous sections of this brief: Is the 45-week rule itself a grant of seniority rights? This is not surprising, for in that court the argument centered on the 45-week rule as a seniority system, not as a "seniority acquisition rule" (*i.e.*, an ancillary part of the system concerned with the seniority lists maintained for each employee classification). It was in reply to the con-

tention that the rule itself is a seniority system that the court explained that "the fundamental component of a seniority system" is the increase of rights as length of service in the designated unit grows. The court never held that every aspect of the system must duplicate this "fundamental component."

The court did raise the issue on which the brewers and the union now rely the heaviest, *viz.*, whether the 45-week rule, though not in itself seniority, is part of the overall brewery seniority system. This question was disposed of in a few sentences near the end of the opinion. Nothing the court said excludes various rules on the acquisition and loss of seniority from "seniority systems."

The 45-week provision establishes a dividing line between two classes of these employees, temporary and permanent. Under separate provisions of the contract, each of the employees in these classes accumulates plant seniority from the date of first employment in the class. But plant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically. Thus, while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it.

[N. 11:] The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.

585 F.2d at 427 (Pet. App. 11-12).

This holding grasps the basic distinction between contractual provisions that are part of a seniority system and those which, though related, are not. However, in light of petitioners' new identification of the seniority system question as a major issue, and the disagreement among the courts of appeal on how to decide where such systems

begin and end, a more extensive analysis is now required.

**B. The "Ground Rules" of Seniority Should be Exempted Under §703(h), Without Immunizing Every Discriminatory Provision Somehow Touched by Seniority Considerations.**

The real problem with this case is that the concept of a "seniority system" is analytically imprecise. Personnel decisions governed by union contracts actually fall under referral and hiring systems, promotional and transfer systems, layoff and recall systems, compensation systems, etc.; and the principle of seniority can be used, in varying degrees, to limit management discretion in each of these areas. One point proved by Defendants' lengthy discussions of the variety of ways the seniority principle is applied in labor contracts is that "seniority systems" are a conglomeration of provisions, covering, to a greater or lesser extent, practically every aspect of personnel decision-making. Rather than seniority being a neat, coherent system in itself, it is a consideration which reaches out and penetrates the systems for hiring, promotion, etc., which a labor agreement sets up.<sup>11</sup>

This is not to say that the term "seniority system" is so unworkable that a useful definition is impossible. The problem is to delineate the boundaries of the set of principles relating clearly to seniority, to effectuate the congressional intent in creating a limited exemption to its attack on discriminatory practices.

Certainly the congressional intent to let *bona fide* operation of the seniority principle stand, despite tempo-

<sup>11</sup>Thus Slichter *et al.* write of the "layoff system" and of "selection systems" for promoting workers. *Op. cit.*, 157, 189 *et seq.* Similarly, a paper on promotion systems breaks down those systems into four components, one of which is "the criteria, such as ability or seniority, governing movements within the promotion unit and into or out of the unit." Among "[t]he more detailed elements within promotion systems ... [are] the weights assigned to ability and seniority criteria for promotions ... [and] the seniority rights which an employee retains when transferring between job classifications or promotion units...." Doeringer, *Promotion Systems and Equal Employment Opportunity*, 1966 Proceedings of the Industrial Research Association 278, 279-80. See also Lapp, *op. cit.* ix-x.

rary perpetuation of some legacies of past discrimination, would be frustrated if "seniority system" were construed as narrowly as Defendants claim the Ninth Circuit construed it. If each contractual provision could be examined separately according to the criterion of whether it, by itself, grants preferences that accumulate over time, then the narrow §703(h) exemption would have little meaning at all, because most basic rules governing *application* of the seniority principle would be excluded see CBA 26-28, 34-35; Union 33).

But avoiding this problem is not the only consideration affecting construction of "seniority system." As Defendants ably point out, among the variations in the way seniority is applied is the *weight* to be given the length of service in the designated unit (CBA 27-28, Union 25). In promotions, for example, many contracts hold that seniority is to be taken into account only when the choice is between two employees considered equal in ability. Peterson, *American Labor Unions* 147 (2d rev. ed. 1963). In those cases, the role of seniority will be stated in contract provisions governing promotion. If such provisions were considered part of the seniority system, then promotional decisions that operate to exclude blacks would be immune from Title VII attack (absent bad faith), even though seniority might have affected few of the decisions.<sup>12</sup>

The idea that discrimination may be perpetuated in every area of management where seniority may be *some* kind of a factor contradicts Congress's historic decision that this country could no longer tolerate employment discrimination, and it ignores the rule of narrow construction of exemptions in such remedial legislation.

<sup>12</sup>In recent government studies, 90% of the major collective bargaining agreements which had provisions on promotion were found to include non-seniority factors of skill, physical fitness, education or training, etc. Seventy-two percent contained non-seniority factors in their layoff provisions. U.S. Dept. of Labor, Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Seniority in Promotion and Transfer Provisions* 7 (Bulletin 1425-11) (1970); *Major Collective Bargaining Agreements: Layoff, Recall, and Worksharing Procedures* 33 (Bulletin 1425-13) (1972).



Defendants also ably demonstrate that many contracts contain provisions limiting the classes of employees who may begin accumulating seniority (CBA 31, Union 47-49). The congressional attack on employment discrimination would be seriously blunted if decisions on who can be promoted to positions where seniority may be accumulated were seen as part of the seniority system. A company where the personnel department hired minorities, but these new employees never made it past the probationary period, could only be restrained if intentional discrimination could be proven. Yet what was being protected would not be the operation of seniority at all.

Avoiding the pitfalls of too narrow or too broad a definition of "seniority system" requires independent judicial analysis. It is obvious from this Court's comprehensive review of the legislative history of §703(h) in *Franks v. Bowman Transportation Co.*, 424 U.S. at 759-60, that Congress never considered the subtleties and possible areas of difficulty in interpreting the term. Section 703(h) was considered by Title VII's sponsors to make explicit something already reasonably clear: that the Act would not outlaw preferences employees had obtained through accrued seniority. The provision was one of several new features in the Mansfield-Dirksen substitute bill offered on the floor of the Senate. Section 703(h) never received the benefit of committee analysis of its implications, and comments in debate only dealt with the basic issue of immunizing seniority. Possible intricacies in defining the scope of "seniority system" were never considered. *Id.* at 757-62. See also: *Teamsters v. U.S.*, *supra*, 431 U.S. at 352; Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431 (1966); and pp. 28-32 of the Union's brief herein.

Nor is it enough to "look to the conventional uses of the seniority system in the process of collective bargaining," *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526 (1949), as the Union and Amici insist (Union 25; AFL-CIO 3, 6-7, 20; EEAC 13). For in "conventional use", labor and management have no need to precisely define the boundaries of seniority systems.

Thus it is not surprising that the lower courts have, since *Teamsters*, had some difficulty in defining what is and what is not part of a seniority system.<sup>13</sup> But a definition that gives effect to the overall congressional intent can be articulated.

**C. Seniority System Provisions State How Seniority is to be Calculated and Affirmatively Set Out the Scope of its Application; Rules Limiting the Application of the Seniority Principle in Favor of Other Policies Are Outside the System.**

In Part III we explained why "seniority" should retain its usual definition of accumulated length of service in the applicable unit. The following is the definition of "seniority system" which should be adopted for purposes of §703(h):

*A seniority system consists of the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. Rules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection or by asserting the application of non-seniority principles to personnel decisions are outside the system. Provisions "which define seniority and its methods of calculation" include those that specify the unit in which seniority is acquired and the situations in which it is lost or regained.*

This test removes decisions based upon application of the seniority principle from Title VII attack: discrimination resulting from taking other factors into consideration remains illegal.

<sup>13</sup>Compare *Bryant; Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1968); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192-1200 (5th Cir. 1968); and *Parson v. Kaiser Aluminum & Chemical Corp.*, *supra*; with *Alexander v. Machinists Aero Lodge No. 735*, 565 F.2d 1364, (6th Cir. 1977), cert. denied 436 U.S. 946 (1978); *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 1186-88 (E.D. Pa. 1977); and *Harris v. Anaconda Aluminum Co.*, 19 EPD ¶9230, at 7354-56 (N.D. Ga. 1979).



This definition is consistent with the Ninth Circuit's decision and also includes almost all of the provisions which defendants fear the holding below would exclude. The Union lists the provisions which it considers typical of seniority systems:

... definitions of the unit of seniority; provisions relating to the acquisition of seniority, such as probationary requirements, retroactivity features and status upon completion of training; provisions stipulating how seniority can be modified or its accrual interrupted due to leaves of absence, layoff, refusals to accept promotion, and transfers or promotions out of the unit; provisions for loss of seniority due to discharge, layoff, or voluntary quit; provisions for retention or calculation of seniority in the event of mergers, plant movement or interplant transfers; and exceptions from length of service in determining the seniority rights of union officials and other special employee groups.

Union 48-49 (fns. omitted).

The last item ("super-seniority") substitutes considerations deemed more important than the seniority principle for the application of that principle and would not be covered by the proposed definition. It could therefore face a Title VII challenge if it somehow operated to discriminate against minorities.<sup>14</sup> This would also be true of probationary requirements, but all other types of provisions listed would be part of seniority systems.

The breweries' useful list of "[t]he wide variety of seniority provisions in American industry" is similarly composed almost entirely of provisions that are indis-

<sup>14</sup>However, a disparate impact of "super-seniority" might be justified under the business necessity doctrine.

putably part of any system of rules measuring seniority and stating its applicability<sup>15</sup> (CBA 25, 26-27; see also AFL-CIO 16-17; EEAC 17-20).

Without saying so explicitly, the court of appeals made the same distinction that Bryant proposes here, excluding only rules that render some workers ineligible for seniority benefits or which supersede the seniority principle with other considerations.<sup>16</sup> Appellate courts in the Fourth and Fifth Circuits, without articulating the proposed definition, have applied the same general principle. For example, in *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978) (rehearing *en banc* ordered), the court wrote,

As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly linked to "a bona fide seniority system." Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it only insulates the seniority aspects of the promotional system.

The court then found illegal the unjustified use of departmental "lines of progression" that held back Blacks' progress into better jobs, in a context of past discrimination. *Id.*, and see earlier decision, 535 F.2d 257, 264-65

<sup>15</sup>Again, only non-seniority aspects of probation and the very last item on the CBA list (role of non-seniority criteria) diverge from the proposed standard. Even here, to the extent that seniority was taken into account, discriminatory impact would escape Title VII challenge. But discriminatory impact resulting from "a supervisor's evaluation, a productivity standard, or any number of other possible factors" (CBA 27) could and should be redressed.

<sup>16</sup>"The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line..." 585 F.2d at 427 n. 11 (Pet. App. 12 n. 11).

(4th Cir. 1976), *cert. denied* 429 U.S. 920 (1976). Lines of progression permit workers to advance to higher paying jobs only in a specified order, without skipping intermediate positions. Since this experience qualification for higher jobs limits the application of seniority, it was correct to hold it subject to Title VII challenge. The same result was reached by a Fifth Circuit court considering a job progression system that operated to discriminate against Blacks. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192-1200.

In *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 and 583 F.2d 132 (*on rehearing*) (5th Cir. 1978, *cert. denied* 99 S. Ct. 2417 (1979), discussed *supra* pp.24-25, the court considered a plant where Blacks had been confined to laborer departments in the past, and where bidding for jobs within each department was governed strictly by plant seniority. However, a rule governing transfers between departments required that workers enter only at the bottom level, where they had to remain for at least 10 days and, after that, until a vacancy opened in a higher-level job. This transfer-discouraging restriction kept Blacks "at a disadvantage begun by the past practices that kept them out of the nonlaborer departments." 575 F.2d at 1388; *see also* 1380-81, 1388-89. In defending its outlawing of the transfer restriction against a *Teamsters* challenge, the court explained,

While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ... bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized....

583 F.2d at 133.

It may be an overstatement to call the transfer restriction "wholly extraneous" to the seniority system, for the difficulty posed by §703(h) is that in most contracts seniority and other provisions are deeply intermingled and affect each other's operation. But certainly the overall approach is correct: The court left the operation of senior-

ity untouched. The bottom entry requirement, however, is open to a Title VII challenge because it restricts the exercise of seniority rights in job bidding in favor of countervailing considerations (either a supposed need for departmental experience before advancing or, more likely, a policy of discouraging transfers).

The correctness of the standard applied by the Fourth and Fifth Circuits, and by the Ninth Circuit in the present case, becomes readily apparent by considering the consequences of the various formulations Defendants and the Amici supporting them propose for defining "seniority system."

**D. Under the Rhetoric of Non-Interference with Collective Bargaining, Defendants Would Withdraw Title VII Protection From Every Personnel Decision Touched by Seniority.**

The basic weakness of Defendants' position is demonstrated by a single fact: neither they nor their Amici can articulate a test that would compel reversal, without expanding the limited §703(h) exception into a yawning gap in Title VII protection.

The CBA, to begin with, cannot quite reconcile itself to limiting the reach of §703(h) by defining "seniority system" at all. It writes approvingly that "courts have not entered the thicket of defining 'seniority' or imposing rigid rules concerning the operation of seniority." (CBA28; *see also* 30.) But it does propose a standard.

*Seniority* is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job. A *seniority system* is any system by which employment decisions are made or job benefits are allocated according to a standard of seniority, whether or not that standard is utilized alone or as one factor combined with other standards. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337. U.S. 521; T.J. McDermott, *Types of Seniority Provisions and the Measurement of Ability*, 25 Arbit. J. 101 (1970).

CBA 26



(It is unclear why the *Aeronautical Lodge* case and the McDermott article are cited; neither defines "seniority system.")

The CBA's definition, by including any system by which benefits are allocated by seniority "alone or as one factor combined with other standards," would protect any discriminatory standard used in transfer, promotion, layoff, or rehire decisions, as long as seniority is also taken into account.

At least since *Griggs v. Duke Power Co.*, *supra*, it has been clear that minorities and women are protected from personnel selection criteria which unnecessarily operate against them. Such criteria are all too common; each of the following has had to be struck down, in one situation or another, for preventing equal employment opportunity without adequate business justification: scored tests; requirements for a college degree, high school diploma, or a specified level of literacy; experience requirements; physical agility tests; height and weight requirements; a record free of arrests or convictions; and subjectively determined standards of interest, attitude and performance.<sup>17</sup>

Nothing in *Teamsters* or in the legislative history of §703(h) implies a congressional intent to immunize such forms of discrimination if the union and employer happen to couple them, in some form or another, with seniority considerations. What the McDermott article does show is that provisions linking, *e.g.*, ability and seniority, in

<sup>17</sup>*E.g.*, *Griggs v. Duke Power Co.*, *supra*; *Payne v. Travenol Laboratories Inc.*, 565 F.2d 895 (5th Cir. 1978); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Swint v. Pullman-Standard*, 539 F.2d 77, 104 (5th Cir. 1976); *Officers for Justice v. Civil Service Commission*, 395 F.Supp. 378 (N.D. Cal. 1975); *Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated on other grounds*, 99 S.Ct. 1379 (1979); *Gregory v. Lytton Systems, Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970), modified 472 F.2d 631 (9th Cir. 1972); *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975); *United States v. Local 357, IBEW*, 356 F.Supp. 104 (D. Nev. 1972); *Young v. Edgcomb Steel Co.*, 363 F.Supp. 961 (M.D. N.C. 1973), modified 499 F.2d 97 (4th Cir. 1974); *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973).

promotional decisions are extremely common. Sometimes seniority is taken into account only if two workers are deemed equal in ability; sometimes the two factors are both listed as considerations, with their relative weight unspecified. McDermott, *supra*, at 105-06. Surely §703(h) can bar claims that, in a particular place of employment, the seniority criterion is perpetuating the effects of past discrimination, without immunizing discriminatory and invalid measures of ability.

The union does no better. It provides no single standard, but its expansive interpretation of §703(h) is clear. It calls for immunizing "all contractual rules that establish and control preferential or beneficial employee rights based upon 'time worked'" (Union 33). There should be immunity for all "rules establishing orders of priority among competing employees," as long as such orders are based on rules that have a "determinative... impact on employee seniority rights," as the 45-week rule does (Union 36, 34). The union places great emphasis on protection of expectations which white employees developed while discrimination was taking place, and this emphasis sometimes creeps into the union's concept of how to determine whether a provision is part of the seniority system. At one point it asserts that rules are seniority provisions if they play a part in controlling "job expectations and vested rights" (Union 39). Finally, it apparently thinks that §703(h) and *Teamsters* protect any "system under which the choicest jobs and the greatest protections against layoffs are allocated" (Union 50).

The loosest of these standards can hardly be taken seriously. If every job-allocation and layoff system were protected by §703(h), there would have been no Title VII ban on discrimination in such decision-making. The same would be true if every employee expectation were protected, since in 1964 many white male employees quite reasonably expected preferential treatment.

But we must answer the somewhat narrower assertions that seniority systems include all rules "that establish and control... rights based upon 'time worked'", or that rules governing the compilation of "seniority" lists



are included as long as those rules have a major impact on seniority rights. The first definition's use of the phrase "time worked" represents a refusal to concede that any seniority system must include within it the requirement that employment rights grow cumulatively as length of service in the applicable unit increases. Thus the union would make the 45-week rule, 90-day probation periods, and even apprenticeship programs of specified duration, seniority standards in and of themselves, simply because they concern "time worked." The infirmities of this novel use of the term "seniority" have already been discussed in Part III of this brief.

The union's unrestricted inclusion in a seniority system of all rules that may "control... rights based upon 'time worked'", with "control" undefined, along with all rules that have a major impact on seniority rights, has the same infirmity as the CBA's similar failure to separate seniority from other considerations. An ability standard for promotion, or for entry into a seniority-protected unit, would "control" the associated seniority rights. No definition of "seniority system" that includes practices which limit the application of the seniority principle, by excluding some employees from a seniority unit or by accommodating non-seniority considerations, can escape protecting all kinds of discriminatory management actions that are not based on seniority at all.

In its amicus brief, the AFL-CIO asserts that seniority systems include:

both a rule (or rules) defining the class of employees entitled to compete [for a given job] and a rule (or rules) defining "service" that will be taken into account in resolving that competition.<sup>18</sup>

<sup>18</sup>The AFL-CIO states that this is a definition of "seniority system" proposed by Slichter *et al.*, citing Slichter at 116 and 157. Slichter says no such thing, only that seniority rules often take into account the work unit, from among the members of which the promotion, layoff, etc. will take place. The book does not even address the question of whether all rules determining who may enter that unit and who within it is eligible for promotion are part of the seniority system.

Both Amici appear to try to avoid exempting all provisions that interact with seniority from Title VII. In a footnote, the AFL-CIO asserts:

This case does not present the question whether employer decisions which *override* seniority are themselves protected by §703(h). It is our view that they are not, i.e., that a decision to *bypass* the employee whose seniority (however defined) gives him first claim to a job is a decision to be measured by Title VII's commands exclusive of §703(h)....

AFL-CIO 25 n. 10.

This footnoted "view," unfortunately, is totally inconsistent with the position the AFL-CIO has taken in this case. Their definition's inclusion of rules "defining the class of employees entitled to compete" would easily include rules containing education, experience, ability, and testing requirements. Moreover, the 45-week requirement which they seek to uphold *does* represent the "overrid[ing]" of seniority, which is why it falls outside the boundaries Bryant proposes for the scope of a seniority system. Simple seniority-based progression to higher levels of security and benefits is superseded by a classification system used to limit the number of workers who receive the benefits of Permanent status, through application of a non-seniority test.

Finally, the EEAC's four-pronged definition starts out wide open. Benefits need increase only "in some fashion... with some measure of time worked" (EEAC 30). "Length of service need not be the sole determinant" of the rights in question, so again all kinds of subjective criteria for advancement could legally cause discrimination as long as seniority was also a factor (*Id.*). Adding all provisions with an undefined "nexus" between them and the operation of the rest of the seniority system expands the concept of such a system beyond any predictable limits<sup>19</sup> (EEAC 30).

<sup>19</sup>An attempt at asserting otherwise fails completely. We are simply told that, e.g., educational requirements for getting into a seniority unit would "lack the essential nexus to the operation of seniority

In a convoluted argument, the EEAC adds a slight restriction on its expansive version of §703(h). In "rare circumstances" a discriminatory provision that had something to do with time worked would not be shielded: "if... the alleged disparate impact is independent of any past practice on the part of the employer" (*Id.* 32-33). The EEAC seems to see the congressional purpose as perpetuating the results of past discrimination, so that a rule that has a disparate impact now, apart from any past acts of the employer, is not to be protected, even though the rule may be part of a seniority system.

What Congress wanted to protect, of course, was the operation of the seniority principle, not perpetuation of past discrimination for its own sake. Furthermore, the four-pronged EEAC definition is so vague and confusing that it would lead to considerably more appellate litigation, as the courts sought to interpret it in all those cases where employers sought to take advantage of their vastly-expanded Title VII defenses.

What Bryant proposes, by contrast, is a simple definition, and one consistent with the congressional intent behind Title VII and its seniority exemption.

#### V. DEFENDANTS' VIEW OF CONGRESSIONAL INTENT IGNORES THE CONGRESSIONAL POLICY OF PROTECTING CIVIL RIGHTS.

We opened this brief with a discussion of the momentous policy decision embodied in the Civil Rights Act of 1964. Until that time discrimination in employment, public accommodations, and voting and other political rights was so entrenched that prior efforts to pass remedial legislation were unsuccessful. When Congress did act, it was to eliminate injustice that shocked the conscience of many Americans, damaged our image abroad, and threatened the very fabric of American society. Title VII was a key

<sup>19</sup>(Continued)  
system," though the 45-week requirement for entering the classification qualifies as "a seniority acquisition rule" (EEAC 31-32). The supposed analytical distinction between these two non-seniority tests for entering a particular seniority line is never explained.

part of the Act, because employment discrimination was an obvious reason why minorities, as a group, were so much poorer than whites.

Any exemptions from Title VII's coverage must be considered with the Act's purposes in mind. This should be obvious, but all four briefs urging reversal are written as if Congress's main preoccupation in 1964 were protecting the sanctity of collective bargaining from the attacks of minorities.

#### A. Minimizing Government Interference in Labor-Management Relations is Not a Primary Objective of Title VII, Which "Intrudes" on a Field Where Unregulated Private Activity Created Intolerable Discrimination.

Throughout their briefs, those urging reversal ignore the fact that the question is "How much discrimination did Congress intend to tolerate?" Instead, the question continually seems to be, "How broadly did Congress intend to go in protecting freedom of contract from government interference?" At times the Union and the EEAC actually seem to forget that only discrimination is subject to challenge, writing as if *all* classification rules not immunized by §703(h) would be held illegal by the court below (Union 27, EEAC 28).

The EEAC states two criteria for evaluating a definition of "seniority system," and they are the standards in fact applied by the other supporters of reversal: (1) enough breadth "to include not only core concepts of seniority, i.e., employment rights increasing with service, but also the customarily associated rules," and (2) ability "to provide unions and employers broad freedom to work out their own collective bargaining agreements" (EEAC 29). *What happened to the basic purpose of Title VII - eliminating employment discrimination - in this list of criteria for construing one of its provisions?*<sup>20</sup>

<sup>20</sup>Though not one of the "two important criteria" (*id.* 29), a "policy to construe the remedial provisions of Title VII broadly" is mentioned later (*id.* 30). However, the EEAC's "broad construction" is inclusion of a requirement of bona fides in its test for an exempt seniority system (*id.* 30-31), a requirement already spelled out in §703(h).



In a similar vein, the employers and unions quote this Court's observation that passage of Title VII would not have been achieved had many legislators not been assured that "management prerogatives and union freedoms... [would] be left undisturbed to the greatest extent possible." *Steelworkers v. Weber*, *supra*, 99 S. Ct. at 2729. (CBA 22, Union 27.) To the CBA, this means that

Federal courts should not undertake to establish inflexible rules for the negotiation and maintenance of seniority systems. The agreements of employers and unions respecting seniority should be presumed to be rational and reasonable solutions to the difficult issues inherent in industrial life.... [T]he bargains of employers and unions [should] be tested and examined only to insure that they are the products of good faith.

CBA 40.

The EEAC, citing mainly cases arising not under Title VII, but under the National Labor Relations Act, warns "against dictating to employers and unions what the terms of their agreements must be" (EEAC 23).

This whole approach is wildly off the mark. Unfettered management activity in some enterprises and unfettered collective bargaining in others created the economic second-class status for minorities and women which Title VII was enacted to end. Beyond that, the entire body of federal labor law stands as proof that there are times when the legislature found the needs of society to be better met by a combination of private action and governmental supervision than by the principle of *laissez faire*. Certainly the operation of seniority systems has been "interfered with" before. See the cases defendants cite, and others as well, arising under 50 U.S.C. App. §459 (on the seniority rights accorded to returning veterans).<sup>21</sup>

<sup>21</sup>*Fishgold v. Sullivan Drydock & Repair Co.*, 328 U.S. 275 (1946); *Trailmobile Co. v. Whirls*, 311 U.S. 40 (1947); *Oakley v. Louisville & Nashville Railroad*, 338 U.S. 278 (1949); *Diehl v. Lehigh Valley Railroad*, 348 U.S. 960 (1955); *McKinney v. Missouri-Kentucky-Texas Railroad*, 357 U.S. 265 (1958); *Tilton v. Missouri Pacific Railroad*, 376 U.S. 165 (1964).

A forerunner of "government interference" in union-management relations, where those relations led to racial oppression, was the imposition of the duty of fair representation on unions. *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

By 1964 it was clear that such "intrusions" were insufficient, and the sweeping prohibitions of Title VII were made a part of the Civil Rights Act. In considering the relationship between Title VII remedies and the federal policy of encouraging use of collectively-bargained grievance procedures, this Court observed, "In the Civil Rights Act of 1964... Congress indicated that it considered the policy against discrimination to be of the 'highest priority'." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Despite its considerable activity in the field, Congress is of course no advocate of unbounded government regulation of business or of collective bargaining. But there is nothing in the history of §703(h) to suggest that congressional opposition to *unnecessary* interference in commerce led to using §703(h) to open a major breach in what would otherwise be sweeping Title VII protection against employer and union activities that have a discriminatory impact. Rather, "in §703(h) of Title VII... [lies] a narrow exception to the broad coverage of that title...." *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 636 (4th Cir. 1978), *cert. denied* 99 S. Ct. 1789 (1979) (fn. omitted).

The legislative history recounted in *Franks v. Bowman Transportation Co.*, 424 U.S. at 757-62, and in Defendants' own briefs, shows that seniority systems were exempted not because of a sudden attack of cold feet at the brink of enacting Title VII's massive interference in labor and management's freedom to discriminate, but *because Congress wanted to exempt seniority systems*. There is no justification for extending this into tolerance of discrimination wherever a contractual provision accommodating non-seniority policies in probation, promotion, transfer, etc., interacts with or limits the application of seniority.

Nothing in Justice Brennan's opinion in the recent *Steelworkers v. Weber* case favors a contrary result.



Though he did, as petitioners emphasize, point out that Congress left the spheres of activity of labor and management "undisturbed to the greatest extent possible," 99 S.Ct. at 2729, the context makes it obvious that "possible" meant "possible, given the goals of the statute." He was careful to spell out those goals, before concluding that the prohibition of voluntary affirmative action agreements would "augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." 99 S.Ct. at 2729. Serious intrusions *in furtherance of the statutory goals* were enacted as Title VII. It is erroneous to treat §703(h) of that Title as a serious obstacle to their attainment.

**B. Employee Expectations Are Not the Standard for Determining the Scope of the Seniority Exception to Title VII.**

Another approach to congressional intent leaves Defendants, particularly the Union, trying to equate seniority rights with any contract-based privileges and preferences that employees could expect to attain before Title VII's enactment. The Union writes that, regardless of the future of the purported seniority system,

employees have specific vested rights and expectations under the system. It is these rights and expectations that Congress chose to protect in Section 703(h).

Union 27 (see also 33, 39, 40, 41).

Certainly part of the rationale for §703(h) was protection of the seniority expectations of incumbent workers who, though they profited to some extent from discrimination, were not to blame. But this is no basis for moving towards "Would workers' expectations be infringed?" as a test for determining what is and is not part of a seniority system, as the Union tends to do (Union 33, 39, 40, 41). Seniority systems are, we submit, exempt from Title VII challenge to avoid the unfairness of routinely ignoring seniority expectations; *and* to protect the device (seniority) so crucial to the security and union strength of all

workers; *and* because the operation of seniority itself, absent other discriminatory considerations, will lead to gradual integration throughout employee ranks. Absolutizing the worker expectations aspect simply avoids a rational analysis of how to delineate a seniority system from related rules that also affect worker expectations but are based on non-seniority criteria.

Exaggerating the truth that Congress probably did consider incumbent workers' expectations builds up an argument that falls of its own weight. For it is obvious that Congress ignored the expectations of millions of workers who could be forgiven for expecting — consciously or not — that they would receive preferential treatment because of their race or sex, or at least because of their diplomas, test results, experience, etc. Even seniority expectations may be disappointed by the necessity to give people unlawfully discriminated against their "rightful place" on the seniority list. *Franks v. Bowman Transportation Co.*, 424 U.S. at 763-70.

**C. Defendants Virtually Admit That Their Proposed Standards Could Defeat the Intent of Title VII by Assailing the Ninth Circuit for Subjecting "Any Number" of Non-Seniority Rules to the Requirement of Non-Discrimination.**

Consistent with their view that what Congress was about in 1964 was shoring up freedom of contract, rather than attacking pervasive discrimination in employment, the brewers', Union's, and Amici's greatest indictment of the decision below is that it would permit Title VII to require large numbers of promotion, transfer, and job security rules to be non-discriminatory in application. Thus the CBA writes,

... [T]he 45-week provision defines the extent of service which is a condition precedent to a higher level of seniority job rights. This provision is similar to any number of probationary periods, eligibility requirements, or other threshold standards which serve the same purpose: creating a tier of job rights distinguishable from those afforded to

temporary, part-time or seasonal employees.  
CBA 31.

The Union agrees, writing that the 45-week rule has numerous industrial counterparts.... Under these circumstances, the decision of the Ninth Circuit Court of Appeal represents an unprecedented intrusion into the private collective bargaining process....

Union 50.

Similarly, the EEAC and the AFL-CIO complain that "scores" or "a vast number" of contractual provisions would be excluded from §703(h) protection (EEAC 25; AFL-CIO 4, respectively), *i.e.*, would have to comply with Title VII's equal-treatment command.

These claims may be exaggerated;<sup>22</sup> but, to the extent that they are true, they support the Ninth Circuit's position. If "scores" of establishments admit minorities into their seasonal workforce but somehow structure their promotional systems so that the year-round staff will remain an all-White preserve, no matter how much seniority the "temporaries" accumulate over the years, their systems *should* be subject to Title VII attack. Nothing in the language or history of this statutory offensive against unequal employment opportunity even hints at exempting such systems.

The same is true of probationary periods. *If*, for some reason, such periods lead to discriminatory results in a particular situation, the logical "nexus" between completing probation and access to seniority rights should not immunize the non-seniority discriminatory practices. And the same may be said of the unspecified "eligibility requirements, or other threshold standards," to which the CBA refers.

These arguments by Defendants verify our conclusions about how broad the exemptions which they propose

<sup>22</sup>Many works on types of collective bargaining agreements do not even mention provisions for "temporary" or seasonal workers. *E.g.*, Fritz & Stringari, *Employer's Handbook for Labor Negotiations* (2d ed. 1964); Trotta, *Collective Bargaining* (1961); BNA, *Basic Patterns in Collective Bargaining Agreements* (1948).

from Title VII really are (see pp. 37-42, *supra*), and show the degree to which their arguments for reversal depend on forgetting the purpose of the Civil Rights Act. That purpose was to enlist the power of the Federal Government in the attack on the pernicious and pervasive effects of discrimination in our society. Preserving the legality of *bona fide* rules that allocate preferences by seniority, including those that state how seniority is to be calculated, is consistent with the specific, and subordinate, purpose that led to the inclusion of §703(h). Exempting the totality of each management decision on which seniority somehow impinges, and each decision which can affect a worker's access to a unit of the workforce that has its own seniority list, is not required by that subordinate purpose and would largely subvert the overall purpose of Title VII.

The breweries and Union do not rely solely on their arguments about policy considerations and congressional intent. They also make a series of arguments based on precedent.

#### VI. NO PRECEDENTS CONCERNING SENIORITY SYSTEMS REQUIRE ELIMINATING TITLE VII PROTECTION FROM THE VARIETY OF PROVISIONS WHICH THE BREWERS AND UNION WOULD EXEMPT.

##### A. Teamsters Does Not Answer the Questions Raised by This Case.

Amicus EEAC claims:

... [T]he seniority system involved in *Teamsters* itself would not pass the Ninth Circuit's test. That system involved departmental seniority units, and employees transferring from one department to another had to forfeit their accumulated seniority and start at the bottom of the new department's list.... Such would not comport with the operation of "true" seniority systems where "employment rights should increase as the length of an employee's service increases." *Bryant, supra*, 585 F.2d at 426.

EEAC 27; see also Union 34-36.

This statement depends on Defendants' confusion of



seniority with seniority system. The Ninth Circuit only spoke of seniority rights being those that increase continually with length of service because it had to explain what seniority is, in order to show why the 45-week rule is not itself a seniority system. But no one denies that seniority systems also contain provisions where seniority is lost. The court below explicitly recognized that seniority can be calculated in a smaller unit than plantwide, i.e., that it can be lost by transfer out of the unit. 485 F.2d at 426 n. 10 (Pet. App. 9 n. 10).

Nor is *Teamsters* controlling because of comparable facts. There Blacks could transfer from a city-driver to a line-driver unit, but their doing so was penalized by loss of seniority. The Court considered the computation of seniority by bargaining-unit service, rather than by company service, to be part of the seniority system. In the present case, the all-White nature of the privileged Permanent group is being perpetuated not by a provision on calculation of, or loss of, seniority, but by the 45-week rule in the context of a shrinking brewery work force. Blacks cannot transfer to the permanent classification, whether or not they are willing to give up seniority earned in another classification — the burden on transfer challenged in *Teamsters*.

#### B. The Lower-Court Cases Relied on by Defendants Are Mistaken or Inapplicable.

Petitioners rely heavily on *Alexander v. Machinists, Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied 436 U.S. 946 (1978). The contract considered in that case provided for plant-wide seniority in the bidding system for vacant jobs, but employees with experience in a similar job ("job equity") had an absolute preference over employees, including more senior ones, who lacked job equity. Because of past discrimination, Blacks did not have job equity for many of the more desirable positions, and the provision was attacked as discriminatory. In expanding the §703(h) umbrella to cover the job equity provision, the court's only explanation was as follows:

... [I]t could be argued that... [the job equity provisions] are not a facet of the seniority system

but a separate element affecting job competition.... The Act, however, speaks not simply of seniority but of a "bona fide seniority... system." A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.

565 F.2d at 1378-79 (fn. omitted).

The court's observation that the Act speaks of a "seniority system" only raises the question of the scope of the system; it does not answer that question. Further, the hesitant comparison of job equity to limited occupational seniority ("in a sense") simply shows, we submit, that the court did not understand the problem. The job equity rule is not an occupational seniority provision; it is clearly an experience preference. The essence of a seniority provision is absent when occupational seniority is so "limited" that it does not matter how senior one is on the job. Experience requirements, like many others equally neutral on their faces, have long been held subject to Title VII challenge where they have a disparate impact on minorities and women. See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Afro American Patrolmen's League v. Duck*, supra.

The *Alexander* court did not apply any of the standards being proposed to this Court for determining what seniority-related rules are actually part of a seniority system. Rather, it found the job equity rule itself to be a form of seniority, because it lacked the *Bryant* court's understanding that "[t]he fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases," 585 F.2d at 426 (Pet. App. 9).

The other authorities cited by defendants are even less persuasive. *Crocker v. Boeing Co.*, 437 F.Supp. 1138,



1186-88 (E.D. Pa. 1977) and *Harris v. Anaconda Aluminum Co.*, 19 EPD 19230, at 7354-56 (N.D. Ga. 1979) deal with job rules that do raise the question as to whether they are part of the seniority system or not, but neither court provided any analysis of the problem before holding §703(h) inapplicable. Two other cases cited by the Union (Union 38 nn. 38 & 39) are not authorities for their position at all. *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 71-73 (E.D. Pa. 1977) involved the same question as *Teamsters*: whether seniority loss after inter-unit transfer could be attacked under Title VII. *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. 223, 247-48 (D. Del. 1978), considered an attack on the use of departmental seniority, in a context where Blacks had lower seniority in departments that were kept all-White until 1960. Thus both cases obviously dealt with questions of seniority computation, in particular the scope of the unit in which job service would be credited. They did not involve non-seniority restrictions on access to preferred positions, like the 45-week rule.

**C. Cases Upholding the Legality of Non-Seniority Ranking Provisions Against Non-Civil-Rights Challenges Shed No Light on the Scope of the §703(h) Exemption.**

Petitioners also quote and discuss a number of cases which show that "artificial seniority credit," as the AFL-CIO correctly puts it (pp. 12, 14), may legally be granted for reasons other than time actually worked in the seniority unit. These cases do not, however, prove that the court below was wrong in holding that "the fundamental component" of a seniority system is the accrual of preferences as time worked increases. The cases are *Aeronautical Lodge v. Campbell*, *supra* (no violation of returning veterans' statutory seniority rights, in placing union officers at the top of the layoff-recall list); *Ford Motor Co. v. Huffman*, 345 U.S. 339 (1953) (no breach of union's duty of fair representation, in giving returning veterans seniority credit for period of military service predating employment); *Franks v. Bowman Transportation Co.*, *supra* (workers subject to discrimination outlawed by Title VII entitled to remedy of seniority credit they would have earned but for discrimination); and *Outland v. Civil Aero-*

*navitics Board*, 284 F.2d 224 (D.C. Cir. 1960) (in integrating pilot ranking lists of two merged airlines, no violation of Board-ordered "fairness and equity" in not only recognizing company seniority, but also considering experience with different types of aircraft and accommodating need to make compromises to arrive at agreed list).

Everything but the conclusion is indisputable. Yes, it is possible in promotional, layoff, and other systems to give employees preferences based on criteria other than "straight seniority," i.e., strict length of service. Yes, there are instances where the added factor to be taken into account is, unlike ability or attitude, so related to the passage of time that the method of expressing the other factor is artificial seniority credit (*Ford, Franks*). Yes, a preference ranking that takes into account seniority, modified by other factors, is sometimes loosely called a seniority list (*Aeronautical Lodge, Outland*). Yes, all four cases have broad language commenting on the variability of seniority systems, along with narrower holdings that departures from strict seniority to accommodate other interests do not violate various legal duties.<sup>23</sup>

But what does all this contribute to analysis of the problem now before the Court? Precious little. These cases support the statement that "time is rarely the sole element of a seniority system" (CBA 28). Yet they certainly do not show that it is not the *central* element of any system that should be called a seniority system. Nor, once a seniority system has been found to exist, do they help delineate which rules are part of it and which are outside it.<sup>24</sup>

<sup>23</sup>In the CBA's *Outland* quotation, unindicated omission of two key sentences makes the court's language appear broader than it is. Cf. CBA 30 with 284 F.2d at 228.

<sup>24</sup>These cases could only be relevant to an issue not raised by the instant case: whether a provision granting artificial seniority credit of service in an institution not open to women or minorities would be legalized by §703(h). Cf. *Massachusetts v. Feeney*, 99 S.Ct. 2282 (1979).

If such ever occurred, the situation would be a borderline case under any reasonable definition of "seniority system". Respondent believes that such a case should not be immune from attack for its discriminatory impact, but the possibility of such problem arising seems remote to begin with, and there is no need to try to resolve it in the absence of a case raising it in concrete form.

Finally, the cited cases do vary in whether they use the term "seniority" loosely<sup>25</sup> or accurately.<sup>26</sup> In none of these cases, however, was the meaning of the term itself an issue. It might be argued that the looser phraseology can assist interpretation of §703(h) by showing how the term "seniority" was commonly used at the time Congress passed the Civil Rights Act, but such an argument would be untenable. First, Congress's obvious inattention to defining terms or considering the complexities that §703(h) would later engender would make it preposterous to argue that the legislators consulted judicial opinions that used the term "seniority" and that they intended it as a term of art. Second, as the materials cited in Part III of this brief show, the occasional overbroad use of "seniority" — again, in contexts where such use made no difference whatever — are unsupported by legal, economic, or management texts which define "seniority," and are even contrary to the dictionary definition. To argue that incidental language in a few opinions cited should now be controlling, when §703(h) and *Teamsters* suddenly make clarity on what is and is not seniority crucial, is to ignore the rule of narrow construction of exemptions from remedial legislation, and to make a mockery of the real congressional policies discussed in Part II, *supra*.

<sup>25</sup>*E.g.*,

The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject.

*Outland v. Civil Aeronautics Board*, 284 F.2d at 228 (apparently using "seniority" as preference ranking in general).

<sup>26</sup>*E.g.*,

There are great variations in the use of the seniority principal through collective bargaining...All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining.

*Aeronautical Lodge 727 v. Campbell*, 337 U.S. at 526 (recognizing that the variations are not themselves forms of seniority, but limitations upon its use).

It need only be added that Defendants' attempts to seek guidance from the veterans' seniority cases are curiously incomplete. Since the cases they cite were decided, others have arisen where the actual scope of the statutory right to job restoration "without loss of seniority" was in question. *McKinney v. Missouri-Kansas-Texas Railroad*, 357 U.S. 265 (1958), reiterated the rule that a returning veteran is entitled to the position he would have attained "on the moving escalator of terms and conditions," had he remained at his place of employment continuously. *Id.* at 271. However, relief was denied in that case because the position sought depended not only on seniority, but on the employer's evaluation of ability and fitness:

... [A] veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer.

*Id.* at 272.

Later cases applied the same distinction between rights and benefits that "would have automatically accrued" and those that were contingent on other factors as well. *Accardi v. Pennsylvania Railroad*, 383 U.S. 225, 229-30 (1966); *Alabama Power Co. v. Davis*, 431 U.S. 581, 585 (1977).

These cases clearly recognize the intermingling of seniority and other factors in various managerial decisions. They also recognize the need to "enter the thicket" (CBA 28) of separating seniority from those other factors, in order to avoid giving a statute concerning seniority rights broader reach than Congress intended. In fact, in distinguishing seniority from other considerations, they use the language of "automatic" accrual that the breweries and the Union find so objectionable in the Ninth Circuit opinion in the instant case.

Having considered why the 45-week rule is neither a seniority provision nor a part of a seniority system, by any reasonable definition of those terms, we should state what Bryant considers to be the proper disposition of this case.



## VII. THE PROPER DISPOSITION OF THE CASE

Because the 45-week provision is not part of a seniority system, the case should be remanded to the district court where, at trial, Bryant can show that the impact of the 45-week provision is to perpetuate the effects of discriminatory hiring practices of the past. At the same time he will have the opportunity to prove the particular acts of intentional discrimination which he has alleged in his complaint and which, regardless of the outcome of this appeal, must be litigated (A 16-18, ¶¶ 13, 20, 21, 22 & 22a).

Defendants' argument that the district court should hear evidence on whether, as a factual matter, Permanent status comes with length of service has already been considered. Given the 45-week provision, there is simply no guarantee that length of service will control; and without such a guarantee, there can be no true seniority system. Because no factual showing can fill that gap and supply the missing guarantee, there is no reason for such a remand (see pp. 23-24, *supra*).

In remanding the case, it would serve the interest of judicial economy if the Court made it clear that Bryant need not prove that the 45-week rule has a disparate impact *among* Black and White Temporaries, since Defendants raise this question in passing and may argue it on remand (CBA 33-34; Union 26; also EEAC 35). Bryant concedes that the rule, if applied consistently, would be an equal obstacle to all Temporaries seeking Permanent status. Its vice is that it "locks in" or perpetuates the discriminatory hiring practices of the past — not that it singles out Blacks for special treatment. This is a problem which it shares with seniority systems. The difference is that such systems are specifically protected by §703(h), while the 45-week provision is not.

Certainly some of the disparate-impact cases, like those dealing with race-biased diploma requirements, concern an unequal impact on individuals of different races.<sup>27</sup> Sometimes, however, the problem comes from en-

<sup>27</sup> Even in those circumstances it could be argued that the White without a diploma experiences the requirement no differently than a Black in the same situation.

tirely neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices," burdening White and minority advancement to positions that were made all-White by past discrimination. *Teamsters v. U.S.*, 431 U.S. at 349, quoting *Griggs v. Duke Power Co.*, 401 U.S. at 430 (1971). The burden on Whites does not negate the fact that the burden on minorities perpetuates the results of past discrimination. See, e.g., the transfer restriction in *Teamsters*, which the Court stated would have been illegal but for §703(h) (431 U.S. at 349); and see, *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 344 (5th Cir. 1977) (maximum age requirement for entry into apprenticeship program struck down as perpetuating the effects of past discrimination even though neutral in operation). See also the cases granting an equitable remedy of accelerated minority hiring into all-White job categories.<sup>28</sup> Such remedies do not help those originally discriminated against in years past, nor do they stop with ordering equal treatment. What they do is apply the Title VII grant of power to "eliminate the discriminatory effects of the past," *Louisiana v. United States*, 380 U.S. 145, 154 (1965), in dismantling "racially stratified job environments" which Congress wanted to eliminate. *McDonnell-Douglas Corp. v. Green*, 411 U.S. at 800. The all-White group of brewery Permanents is such an environment.

Since *Teamsters* only ruled that seniority-caused perpetuation of past discrimination is exempt from Title VII, not that §703(h) exempts *all* neutral practices which have the effect of "freezing" the status quo, Bryant should be entitled on remand to prove the kind of Title VII violation which he alleges in his complaint.

<sup>28</sup> E.g., *Carter v. Gallagher*, 542 F.2d 315 (8th Cir. 1972), cert. denied 406 U.S. 950 (1972); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973); *Rios v. Enterprises Assn. Steamfitters*, 501 F.2d 622 (2nd Cir. 1974) (citing numerous cases from eight circuits).



**CONCLUSION**

For the foregoing reasons the decision of the court of appeals should be affirmed and the case should be remanded to the district court for trial.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
v. *Petitioners,*

ABRAM BRYANT,  
and *Respondent,*

TEAMSTER BREWERY AND SOFT DRINK WORKERS  
JOINT BOARD OF CALIFORNIA, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

BRIEF FOR THE UNION RESPONDENTS

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## TABLE OF CONTENTS

	Page
OPINION BELOW .....	1
JURISDICTION .....	2
QUESTIONS PRESENTED .....	2
STATUTE INVOLVED .....	3
STATEMENT OF THE CASE .....	3
A. Nature Of The Amended Complaint And Pro- ceedings In The District Court .....	3
1. Allegations of the Second Amended Com- plaint .....	4
2. Character of the Disputed Collective Bar- gaining Provisions .....	7
(a) Brewery Structure .....	8
(b) Classifications .....	8
(c) Seniority Tiers Within Classifications..	9
(d) Layoff and Rehire .....	11
(e) Bumping Rights .....	11
(f) Referral Priorities .....	12
B. Proceedings In The Court of Appeals .....	13
SUMMARY OF ARGUMENT .....	16
ARGUMENT .....	21
I. Congress Intended To Grant A Measure Of Im- munity To All Seniority Systems By Enacting Section 703(h) Of The Civil Rights Act Of 1964, And It Is Not For The Courts To Vitate This Choice By Drawing Narrow Distinctions Be- tween Various Contractual Systems According To The Scope Of The Seniority Units They Establish, Or How Seniority Is Acquired Or Measured Within Each Unit .....	21



## TABLE OF CONTENTS—Continued

	Page
A. Development Of The Seniority Principle In Collective Bargaining .....	21
1. Emergence of Seniority .....	21
2. Factors Contributing To Seniority Development .....	22
3. Modern Seniority Arrangements .....	24
B. Congress Meant To Protect Employee Rights That Had Vested Under Existing Seniority Systems .....	26
C. Established, Bona Fide Seniority Practices Under Which Employee Job Rights Have Vested Are Immune From Attack .....	33
1. Seniority Rules Are Protected .....	33
2. Lower Court Decisions .....	36
3. Classification Devices Contrasted .....	40
4. Conclusion .....	41
II. The Court Of Appeals Improperly Concluded That The Joint Board Brewery Agreement's Forty-Five Week Industry Service Rule Significantly And Abnormally Departs From Length Of Service Criteria Without Record Evidence Or Any Consideration Of The Conventional Uses Of Seniority In The Process Of Collective Bargaining .....	42
A. Sections 4 and 5 of the Agreement Establish A Combination Seniority System Which Accords Significant, If Not Always Controlling, Weight To Total Length Of Service..	43
B. Seniority Systems Agreed To In Collective Bargaining Often Provide For Variations From Absolute Length Of Service Criteria In Computing Seniority Rights .....	47
CONCLUSION .....	50

## TABLE OF AUTHORITIES

CASES:	Page
Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949) .....	16, 20, 21, 25, 26, 27, 36, 47, 48, 49
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) .....	40
Alexander v. Aero Lodge 735, Int'l Ass'n of Machinists, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978) .....	17, 38, 39
American Tel. & Tel. Co., 20 N.W.L.B. 201 (1944) ..	49
B. F. Goodrich Co., 14 N.W.L.B. 306 (1944) .....	49
Brotherhood of Locomotive Firemen v. Tunstall, 163 F.2d 289 (4th Cir.), cert. denied, 332 U.S. 841 (1947) .....	26
Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) ..	36
Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977) .....	38
Dickerson v. United States Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977) .....	38
Dothard v. Rawlinson, 433 U.S. 321 (1977) .....	40, 41
EEOC v. E. I. duPont de Nemours & Co., 445 F. Supp. 223 (D. Del. 1978) .....	27, 38
Farris v. Board of Educ., 576 F.2d 765 (8th Cir. 1978) .....	41
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) .....	17, 27
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) ..	16, 20, 25, 36, 47, 49
Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) .....	31
General Motors Corp., 22 N.W.L.B. 233 (1945) ..	49
Gerber Prods. Co., 12 N.W.L.B. 74 (1943) .....	20, 24, 49
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..	31, 40
Harris v. Anaconda Alum. Co., 19 [CCH] EPD ¶ 9230 (N.D. Ga. 1979) .....	38
Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) .....	47
Humphrey v. Moore, 375 U.S. 335, reh'g denied, 376 U.S. 935 (1964) .....	47, 49

## TABLE OF AUTHORITIES—Continued

	Page
International Brotherhood of Teamsters (T.I.M.E.- D.C. v. United States, 431 U.S. 324 (1977)..... <i>passim</i> reversing 517 F.2d 299 (5th Cir. 1975) .....	35
Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 239 (1979) .....	41
McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265 (1958) .....	50
Movement for Opportunity v. Detroit Diesel Div., General Motors Corp., 18 [BNA] FEP 557 (S.D. Ind. 1978) .....	40
New Jersey Brewers Ass'n, 18 N.W.L.B. 114 (1944) .....	20, 24, 49, 50
NLRB v. Westinghouse Air Brake Co., 120 F.2d 1004 (3d Cir. 1944) .....	23
Parson v. Kaiser Alum. & Chem. Corp., 575 F.2d 1374, on rehearing, 583 F.2d 132 (5th Cir. 1978), cert. denied, 60 L.Ed. 2d 1073 (1979)....	36, 37
Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978) .....	18, 34
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 99 S.Ct. 1020 (1979) .....	36
Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) .....	26
Scheuer v. Rhodes, 416 U.S. 232 (1974) .....	19, 46
Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 241 (1979)..<	33
Southbridge Plastics Div., W. R. Grace & Co. v. Rubber Workers, Local 759, 565 F.2d 913 (5th Cir. 1978) .....	37
Steele v. Louisville & N. R.R., 323 U.S. 192 (1944)..<	26
Syres v. Oil Workers, Local 23, 350 U.S. 892 (1955), reh'g denied, 350 U.S. 943 (1956).....	26
Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964)..<	20, 44
U.A.W., Local 1251 v. Robertshaw Controls Co., 405 F.2d 29 (2d Cir. 1968) .....	41

## TABLE OF AUTHORITIES—Continued

	Page
United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) .....	46
United Steelworkers (Kaiser Alum. & Chem. Corp.) v. Weber, 47 U.S.L.W. 4851 (U.S., June 27, 1979) (Nos. 78-432, -435, -436) .....	20, 31, 37, 39, 50
Watkins v. United Steelworkers, Local 2369, 516 F.2d 41 (5th Cir. 1975) .....	19, 43
Whitfield v. United Steelworkers, Local 2708, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959) .....	26

## STATUTES AND RULES:

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 (e) (1976) .....	<i>passim</i>
§ 703 (h) .....	<i>passim</i>
§ 703 (j) .....	31
Civil Rights Act of 1866, § 1, 14 Stat. 27, as amended, 42 U.S.C. § 1981 (1976) .....	3
Labor Management Relations Act of 1947, § 301, 61 Stat. 156, 29 U.S.C. § 185 (1976) .....	4
National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-60 (1976) .....	4, 23
§ 8 (a) (3) .....	24
§ 9 (a) .....	26
Selective Training & Service Act, § 8, 54 Stat. 840 (1940), as amended, 38 U.S.C. § 2021 (1976) .....	23, 25, 27
Railway Labor Act, § 2, Ninth, 45 U.S.C. § 152, Ninth (1976) .....	26
Judicial Code:	
28 U.S.C. § 1254 (1) .....	2
Federal Rules of Civil Procedure, Rule 12 (b) (6) ..	4
Supreme Court Rule 21 (4) .....	2

## TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS:	Page
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963)....	29, 32
H.R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess. (1963) .....	30
Hearings on S. 773, S. 1210, S. 1211 and S. 1937, Bills Relating to Equal Employment Opportunities, Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963)....	29
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110 Cong. Rec. 1518 (1964) (remarks of Congressman Celler) .....	30
110 Cong. Rec. 7206-07 (1964) (remarks of Senator Clark) .....	31
110 Cong. Rec. 2726 (1964) (remarks of Congressman Dowdy) .....	29
110 Cong. Rec. 486-88 (1964) (remarks of Senator Hill) .....	29
110 Cong. Rec. 5423 (1964) (remarks of Senator Humphrey) .....	30
110 Cong. Rec. 11848 (1964) (remarks of Senator Humphrey) .....	30
110 Cong. Rec. 12722-24 (1964) (remarks of Senator Humphrey) .....	31, 32
110 Cong. Rec. 9113 (1964) (remarks of Senator Keating) .....	30
110 Cong. Rec. 6564 (1964) (remarks of Senator Kuchel) .....	30
110 Cong. Rec. 7091 (1964) (remarks of Senator Stennis) .....	29
110 Cong. Rec. 5251 (1964) (remarks of Senator Talmadge) .....	29
110 Cong. Rec. 2804-05 (1964) .....	30
110 Cong. Rec. 7213 (1964) .....	31
110 Cong. Rec. 7216-17 (1964) .....	31

## TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE RULINGS:	Page
United States R.R. Admin., General Order No. 27, May 25, 1918 .....	22
MISCELLANEOUS:	
Aaron, <i>Reflections On The Legal Nature and Enforceability Of Seniority Rights</i> , 75 Harv. L. Rev. 1532 (1962) .....	24, 25, 28, 41
Aronson, <i>Layoff Policies and Practices</i> (Indus. Rel. Sect., Princeton Univ., 1950) .....	23
Asher, Address to the Joint Labor-Management-Public Conf. on Seniority, Univ. of Wisc., Oct. 21, 1950, on file U.S. Dep't. of Labor Library....	24
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Lapp, <i>How To Handle Problems Of Seniority</i> (1946) .....	21, 22, 23, 25
Meyers, <i>Seniority As Security: A Rationale</i> , in 89 Monthly Lab. Rev. 127 (Feb. 1966) .....	28, 32
Mowatt, <i>Seniority Provisions In Collective Agreements</i> (Dep't. of Labor, BLS, 1938) .....	23
Note, <i>Seniority Clauses In Labor Contracts</i> , 32 Iowa L. Rev. 107 (1946) .....	24
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## TABLE OF AUTHORITIES—Continued

	Page
Slichter, <i>Layoff Policy</i> , Ninth Ann. Conf. on Ind. Rel., Univ. of Mich., April 12-15, 1939, on file U.S. Dep't. of Labor Library .....	22, 23
Slichter, Healy & Livernash, <i>The Impact Of Collective Bargaining On Management</i> (1960) .....	24
Stacy, <i>Title VII Seniority Remedies In A Time Of Economic Downturn</i> , 28 Vand. L. Rev. 487 (1975) .....	26
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U.S. Dep't. of Labor, Bureau of Labor Statistics, <i>Administration Of Seniority</i> (Bull. 1425-14) (1972) .....	24, 47, 48, 49
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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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BRIEF FOR THE UNION RESPONDENTS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 585 F.2d 421. It is reproduced at Pet. App. 1-13.<sup>1</sup> The order and judg-

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<sup>1</sup> Citations to the Appendix filed with the Petition for Certiorari will be indicated by "Pet. App." "A" refers to the Appendix filed in this Court, while references to the Record below will be prefaced

ment of the United States District Court for the Northern District of California are reproduced at A. 43-45. No opinion was written by the District Court.

### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 3, 1978. A motion for rehearing was denied on January 11, 1979. This Court granted the Petition for a Writ of Certiorari on June 4, 1979. 47 U.S.L.W. 3786. The Union parties did not file a Petition; they are before this Court as Respondents supporting the position of the Petitioners under Sup. Ct. Rule 21(4). This Court has jurisdiction under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. Does a collectively bargained provision, included for more than twenty years in agreements covering a multi-employer bargaining unit, which establishes separate job classifications and tiers within such classifications for permanent, temporary and new employees, constitute a seniority system within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), where:

(a) Employees progress between tiers on the basis of time worked in the industry in a single calendar year;

(b) Progression between tiers affords employees greater benefits and job security both in individual brewery establishments and in the industry; and

by "R." The Petitioners, California Brewers Association and the individual breweries, will be referred to collectively as the "Employers." The Teamster Brewery and Soft Drink Workers Joint Board of California and the individual Local Unions will be referred to collectively as the "Unions." The Respondent, Abram Bryant, will be referred to by name or as the "Respondent."

(c) Employees are ranked within job classifications and within each tier according to length of tier service in the establishment?

2. If so, did the Court of Appeals err by deciding without a factual record that the requirement for advancing between temporary and permanent tiers (i.e., that the employee work in the industry for forty-five weeks in a calendar year) was separable from that seniority system and not protected by Section 703(h)?

### STATUTE INVOLVED

Section 703(h) of the Civil Rights Act of 1964, 78 Stat. 257, 42 U.S.C. § 2000e-2(h), provides in relevant part:

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."

### STATEMENT OF THE CASE

#### A. Nature Of The Amended Complaint And Proceedings In The District Court

The original complaint in this case was filed on October 19, 1973 (R. 1-15). It was amended on February 15, 1974 (R. 106-22) and again amended on May 22, 1974 (A. 9-24). As amended, the complaint alleged that the Employers and Unions had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, § 1, 14 Stat. 27, by negotiating, maintaining and

enforcing seniority and referral provisions that had the result of perpetuating racial discrimination in hiring (A. 18-19). A second claim for relief alleged that the Unions had breached their duty of fair representation under 29 U.S.C. §§ 159, 185, by negotiating "unreasonable privileges for some employees over others . . ." (A. 19). The case was filed as a class action in which the single named plaintiff, Abram Bryant, sought to represent a class consisting of all Blacks who have been or will be employed by the Employers in California, as well as all Blacks who have or will seek such employment (A. 11-12). On September 11, 1974, the District Court dismissed the second amended complaint for failure to state a claim upon which relief could be granted (A. 43-45). Rule 12(b)(6), Fed. R. Civ. P.

### 1. Allegations of the Second Amended Complaint<sup>2</sup>

Respondent Bryant alleges that he is a Black male, first employed by Petitioner Falstaff on May 1, 1968 (A. 11, 13, 17), and a member of Respondent Local 856 (A. 11, 17). He is an incumbent, temporary brewer holding seniority rights under Sections 4 and 5 of the collective bargaining agreement. Falstaff and six other brewery Employers in California are represented, for collective bargaining and labor relations purposes, by Petitioner California Brewers Association. On behalf of the breweries, the Association bargains with Respondent Teamster Brewery and Soft Drink Workers Joint Board of California (A. 12-13). The Joint Board is empowered to represent in collective bargaining negotiations the Respondent Local Unions which, in turn, hold statutory

<sup>2</sup> The evidentiary record in this case contains, in addition to the complaints and Petitioner Falstaff's original answer (R. 16-23), only the collective bargaining agreement between the Employers and the Unions, and Bryant's answers to Falstaff's first interrogatories (R. 284-329). Like the Courts below, therefore, we rely on Bryant's factual contentions in this posture of the case.

representational rights for the breweries' employees (A. 14-15). The Unions and Employers are part of one multi-employer bargaining unit, and are covered by a single agreement statewide in its application (A. 15).

The complaint alleged, *inter alia*, that the Employers historically "have discriminated against [B]lacks both in hiring and employment . . ." (A. 16). The Unions were alleged to have acted in concert with the Employers in such discrimination, and also to have discriminated against Blacks in referring applicants from hiring halls (A. 16). "The vehicles for the perpetuation of this invidious discrimination," according to the complaint, "are the seniority and referral provisions of the collective bargaining agreement . . ." (A. 16). Singled out for particular attention was the Agreement's requirement that an employee work forty-five weeks in the industry in a single calendar year to reach permanent status in his or her job classification (A. 10, 16-17). Because of the contract provisions complained against, and his "off and on" employment in the industry since May 1, 1968 (A. 17), Bryant remained a temporary brewer. Thus, he was ineligible for certain benefits, including added job security, accorded to permanent brewers by the Agreement (A. 17).

Bryant does not contend that his former Employer, Falstaff, discriminatorily applied the disputed contract provisions (R. 310). Also, he admits that similarly situated white employees have failed to advance from temporary to permanent status because they have not fulfilled the industry length of service requirement (R. 306).<sup>3</sup>

<sup>3</sup> Although the second amended complaint alleges that some white employees reached permanent status by working 45 weeks in 2 calendar years (A. 17), Bryant stated in his answers to Falstaff's interrogatories that he knows of only 3 whites who reached permanent status without complying with the industry length of service requirement. He acknowledges that these employees reached permanent status in 1958 (R. 296-97).



This fact is said to be irrelevant to his theory of the case (R. 306). Under Bryant's view, the alleged Title VII violation arises from a coalescence of three factors: (1) A past discriminatory exclusion of Blacks from the California brewing industry (A. 16-17); (2) changed circumstances in California's brewing industry, such as automation, improved brewing methods and consolidation of breweries, which have lessened the demand for labor (A. 16; R. 304-05); and (3) the collective bargaining agreement's restrictive seniority and referral provisions (A. 16-17).

For some time, economic conditions in the brewing industry have made it difficult for temporary workers in Northern California to complete forty-five weeks of service in one calendar year and achieve permanent status. This fact is suggested by Bryant's employment experience. He was first employed by Falstaff on May 1, 1968 (A. 11, 17). From that date until early 1974, he worked intermittently at Falstaff's San Jose and San Francisco plants (R. 290-94, 304; A. 17). Apparently his layoffs were frequent and lengthy (R. 290-94, 314). In March, 1974, Bryant was referred out of Respondent Local 856's hiring hall for employment at Petitioner Theodore Hamm Co. (R. 293; A-18).<sup>4</sup> Bryant contends that his "on and off" employment with Falstaff was caused by the alleged discriminatory provisions of the collective bargaining agreement. He states that white workers were earlier

<sup>4</sup> By 1975, both Theodore Hamm and Falstaff had ceased operations in Northern California, leaving Petitioner General Brewing Co. as the single brewery remaining in the San Francisco area until 1977, when it too closed its plant. Bryant's employment status after April 25, 1974 is not disclosed by the record. There are 4 breweries currently operating in Southern California: Miller Brewing Co., Joseph Schlitz Brewing Co., Anheuser-Busch, Inc. and Pabst Brewing Co. These companies are no longer represented in collective bargaining by the California Brewers Ass'n, but deal directly with Teamster Locals 896 and 1007. The Teamster Brewery & Soft Drink Workers Joint Board of California is no longer in existence.

allowed to accumulate seniority credits while he and other Blacks were discriminatorily excluded from employment (R. 307). Since it is now said to be "impossible" for employees to satisfy the forty-five week service requirement (R. 311), the collective bargaining agreement unlawfully perpetuates past discrimination (R. 309; A. 18).

## ***2. Character of the Disputed Collective Bargaining Provisions***

Although Bryant alleges some instances of direct discrimination,<sup>5</sup> his second amended complaint principally attacks the collective bargaining agreement's seniority and referral provisions (§§ 4, 5). In essentially their present form (A. 27-41),<sup>6</sup> these provisions have been included in successive agreements for nearly twenty-five years (R. 7, 316). Their administration is subject to Section 55 of the Agreement which prohibits discrimination "against any individual because of his race, color, religion, sex, or national origin with respect to opportunity for or tenure of employment . . ." (R. 14, § 55). Sections 4 and 5 of the Agreement afford employees working as brewers, bottlers, drivers, shipping and receiving clerks and checkers job security in a cyclical in-

<sup>5</sup> For example, Bryant alleged that whites with inferior seniority and referral rights were referred before him by Local 856, thus delaying his employment at Theodore Hamm in 1974 (R. 453). He also alleged disparate application of the 45 week industry service requirement (R. 453). *But see* note 3, *supra*. In addition, Bryant claims he suffered wage discrimination in 1973 (R. 297), and that he was denied promotion to a nonunit lab technician's job in 1972 (R. 298). These instances of alleged direct discrimination are beyond the scope of this Court's Writ of Certiorari.

<sup>6</sup> The Joint Board/Association Agreement for 1970-73 was attached to Bryant's October, 1973 complaint (R. 14). At the time suit was initiated, however, the 1973-76 agreement had just been signed. Sections 4 and 5 relating to seniority and referral were not changed by subsequent Agreements.

dustry where employment fluctuations are frequent. Indeed, Bryant "basically agrees that there should be a system [though not the present system] which extends recognition to length of service within the multi-union—multi-employer unit . . ." (R. 306).

(a) *Brewery Structure*.—The structure reflected by Sections 4 and 5 is virtually the same at each establishment operated by the seven brewery Employers signatory to the Agreement. In the broadest outline, brewery establishments are organized along departmental lines. Beer and malt beverages are brewed, aged and finished in the brewing department by brewers and apprentices. To the extent the product is to be packaged in kegs, this operation will be performed in the brewery department (R. 14, § 2(a)(1)). If, however, the product is to be packaged in bottles or cans, the packaging operation will be performed by bottlers in the bottling department (R. 14, § 2(a)(2)). The product is readied for shipment to customers in the shipping department, where receiving and warehousing are also accomplished (R. 14, § 2(a)(4)). Checkers and shipping and receiving clerks work in this department. In those establishments still affording direct delivery service,<sup>7</sup> drivers and helpers in the delivery department will physically transport the product to customers by motor vehicle (R. 14, § 2(a)(3)).

(b) *Classifications*.—Seniority in the brewing industry is exercised within job classifications which correspond to the departmental structure of individual brewery establishments. Each establishment maintains separate seniority lists for brewers, bottlers, drivers, shipping and receiving clerks and checkers (A. 30-31, § 4(c)). Ap-

<sup>7</sup> Generally speaking, the work of the delivery department is now performed by independent distributors which are covered by a different collective bargaining agreement. It is instructive to note that the wage rate schedule for the Agreement in issue no longer carries rates for delivery department employees (A. 42).

prentice brewers (R. 14, § 34) are carried on their own plant seniority list (A. 31, § 4(c)(5)). Unlike other employees, apprentices accrue seniority only at the single brewery establishment where they are employed (A. 33, § 4(f)). Except for apprentices, an employee's relative position on the establishment seniority list is determined by both establishment and industry service in his classification. Not all establishment and industry service is counted in calculating seniority rankings, however.

(c) *Seniority Tiers Within Classifications*.—"For the purposes of seniority," the Agreement establishes within each job classification two or more classes or tiers. In the bottling department, bottlers may be permanent or temporary. Brewers, drivers, shipping and receiving clerks and checkers are classed as permanent, temporary or new employees (A. 27, § 4(a)). As employees progress from the temporary to permanent tiers, for instance, they achieve a higher wage rate (A. 42) and improved employee benefits (e.g., R. 14, §§ 15, 54). Advancement between the new, temporary and permanent tiers also affords an advancing employee a higher establishment seniority ranking in his job classification (A. 30, § 4(c)). On classification seniority lists, other than those maintained for bottlers and apprentice brewers, permanent employees enjoy the highest seniority ranking, followed by temporary employees and then by new employees (A. 30-31, § 4(c)(1)-(3)). Permanent bottlers are ranked above temporary bottlers on a separate seniority list in each establishment (A. 31, § 4(c)(4)).

Progression between the new, temporary and permanent tiers is entirely a function of industry service. To achieve permanent status, an employee must complete forty-five weeks of employment under the Agreement in one classification in one calendar year as an employee of the brewing industry in California (A. 27, § 4(a)(1)). Different rules prevail for apprentices and bottlers. Ap-



prentice brewers achieve permanent status upon completion of their two-year indenture (A. 28, § 4(a)(3); R. 14, § 34(b)), while bottlers become entitled to the full wage rate and permanent status after they have worked 1600 hours in a calendar year (A. 27, § 4(a)(1)). All bottlers who have not achieved permanent status are temporary bottlers (A. 28, § 4(a)(2)). In other classifications, temporary employees are those who have worked under the Agreement for at least sixty working days in the preceding calendar year (A. 28, § 4(a)(2)). "A new employee is any employee who does not qualify as a permanent employee, a temporary employee or an apprentice . . ." (A. 28-29, § 4(a)(4)).<sup>8</sup>

While an employee's competitive status seniority is determinable in part by his industry service, his plant seniority rights vis-a-vis employees having the same industry status (i.e., within the same tier) depend on his establishment service. This is true of all job classifications, whether the employee involved holds permanent, temporary or new status. Within each status ranking or tier of the classification seniority list, employees are arranged in descending order of their plant seniority which is calculated according to their unbroken establishment service in the tier.

For example, the plant seniority of a permanent brewer dates from the first day of his employment as a permanent brewer or apprentice in the establishment

<sup>8</sup> An employee's status and industry seniority are lost upon his voluntary quit or valid discharge (A. 29, § 4(a)(5), (6)). Permanent status is lost if the employee is not employed under the Agreement for any consecutive two-year period which will be extended for incapacity (A. 29, § 4(a)(5)). Temporary status is lost if the employee does not work under the Agreement for one year (A. 29, § 4(a)(6), A. 34-35, § 4(1)(4)), and "a new employee who fails to qualify for transfer to temporary employee status at the end of a year shall lose his status as a new employee" (A. 30, § 4(a)(7)).

during his current period of unbroken plant service (A. 31). Excluded from the calculation would be any service as a temporary or new brewer, any prior establishment service as a permanent brewer if followed by a break in that service, any service in another establishment (other than that which qualified him as a permanent brewer), and any service in another job classification. The plant seniority of a temporary or new employee is also measured from the first day of employment in his job classification as a temporary or new employee, respectively, during his current period of unbroken plant service (A. 31-32). As with permanent employees, therefore, seniority for temporary and new employees is determined by length of tier service in their job classifications within the establishment.

(d) *Layoff and Rehire*.—An employee's position on the establishment seniority list for his classification governs important job protection rights. Employees are laid off from the bottom of the seniority list, "and the first employee on the seniority list of the establishment who is not working in the establishment shall be the first rehired . . ." (A. 30, § 4(c)). In each job classification, then, employees are laid off in ascending order of their plant seniority within tiers. This means that the most junior new employee is first laid off in each classification. After all new employees are laid off in seniority order, the most junior temporary employee in the classification then becomes subject to layoff. Permanent employees are not laid off while temporary employees in the same job classification are working. For the junior-most permanent employee in establishment service holds a higher seniority ranking than the most senior temporary employee in the same job classification. Local Unions are required to dispatch employees for rehiring in reverse order of their layoff (A. 37, § 5(c)(1)).

(e) *"Bumping" Rights*.—Moreover, achievement of permanent status through industry service affords employees



job security beyond single establishments. Under Section 4(b) of the Agreement (A. 30),

"A permanent employee who has been laid off . . . may be dispatched—if such employee so desires—for work in any establishment of any Individual Employer in the local area of his last employment and shall have the right to replace—as of Monday—the temporary employee or new employee with the lowest plant seniority therein employed regardless of anything in this Agreement to the contrary." [See also A. 35 relating expressly to bottlers.]

The "bumping" provisions are administered in accordance with Section 5(h) of the Agreement (A. 41) which requires individual Employers to notify the Local Union hiring hall each week by 12:00 A.M., Thursday, of employees to be laid off at the end of the week and of their hiring needs for the next week. By 12:00 A.M., Friday, the Local Union will notify the Employer of the number of employees to be dispatched on the following Monday to displace new and/or temporary employees, as well as the names of employees it has contacted and dispatched up to that time.

(f) *Referral Priorities.*—Consistent with their "bumping" rights, permanent employees who are out of work are entitled to referral priorities on dispatch from the hiring hall. After employees holding seniority in individual establishments are dispatched to their Employers, the order of referral for brewers, drivers, shipping and receiving clerks and checkers is as follows (A. 37-38, § 5(c) (2)): unemployed permanent employees registered in the established area, unemployed temporary employees registered in the established area, registered permanent employees who have been laid off and desire dispatch in another classification (A. 34, § 4(k)), and thereafter new employees who may be unemployed. Subject to re-employment and "bumping" rights, the order of referral

for bottlers requires that registered permanent bottlers be dispatched first, permanent employees registered in other classifications be next dispatched, and temporary bottlers be dispatched last (A. 37-38, § 5(c) (2)).

Within each of the permanent, temporary and new tiers, employees are dispatched on the basis of their length of service in the industry in California (A. 37-38, § 5(c) (1) (4)). Section 5(c) (6) of the Agreement provides with respect to the foregoing dispatch rules (A. 39),

"The seniority privileges protected by subsection '(c) (1) and (2)' hereof may be exercised only if such vacancy is to be filled for thirty-seven and one-half (37½) straight-time hours (30 hours in the case of Bottlers) or more and if the person with seniority reports for such work within forty-eight (48) hours of the existence of the vacancy."

If vacancies remain after employees with seniority have been dispatched, the Local Union will then dispatch applicants who have registered for employment in the following order: applicants with experience in the work in California, with those having the most experience being referred first; applicants having acquired experience in the work elsewhere, also in descending order of their experience; and applicants with no experience in the chronological order in which their applications were filed (A. 38, § 5(c) (3)). The Agreement obligates Local Unions to administer its provisions without regard to considerations of union membership or activity, and to "exercise the responsibility of referring workers to employment and operating employment offices therefor in accordance with law . . ." (A. 39-40, § 5(e), (f), (g)).

#### B. Proceedings In The Court of Appeals

An appeal to the Ninth Circuit Court of Appeals was taken on November 14, 1974, from the District Court's

judgment dismissing the complaint (R. 524). The issue briefed and argued initially by the parties was whether the procedures complained of by Bryant were in the nature of legitimate "last hired, first fired" plant seniority provisions, as the District Court concluded (585 F.2d at 424, Pet. App. 5), or whether they constituted classification seniority provisions having an allegedly prohibited "lock-in" effect said to perpetuate past hiring discrimination. In this regard, Bryant stated the central issue on appeal in these terms: "Does a seniority and referral system which does not discriminate on its face, but which nevertheless serves to perpetuate past discrimination in hiring, violate Federal law?" (Appellant's Opening Brief, Civ. No. 75-1263, 9th Cir., dated April 21, 1975.)

While the appeal was pending, this Court issued its decision in *International Brotherhood of Teamsters (T.I.M.E.-D.C.) v. United States*, 431 U.S. 324 (1977), holding that a racially neutral classification seniority system qualifies for the protection afforded "bona fide seniority systems" by Section 703(h) of the Act, even though it may perpetuate past hiring discrimination. Consequently the Court of Appeals accepted supplemental briefs from the parties addressing the issues raised by *Teamsters*. Until that time, no party had suggested that the contract provisions under attack constituted anything other than a seniority system. Nevertheless, without additional fact-finding, a panel of the Ninth Circuit Court of Appeals designated "the critical question" as "whether the 45-week requirement, found in section 4 of the collective bargaining agreement, is in fact a seniority system or part of such a system . . . ." 585 F.2d at 426 (Pet. App. 8). The panel then proceeded to hold, Circuit Judge Trask dissenting, that while the Agreement contains a seniority system, the forty-five week industry service requirement for attaining permanent status is not part of it. 585 F.2d at 427 (Pet. App. 12).

In holding that the forty-five week industry service provision was separable from the seniority system, the panel majority believed that the provision lacks the "fundamental component" of a seniority system. It stated that "employees junior in service to the employer *may* acquire greater benefits than senior employees" because "the acquisition of permanent status *may* be independent both of the total time worked and the overall length of employment . . . ." 585 F.2d at 426 (Pet. App. 9, emphasis added). On the basis of this dual hypothesis, the panel majority thought that the instant case could be distinguished from *Teamsters*, *supra*, 431 U.S. 324. That the challenged system was somehow considered susceptible to "discriminatory application" also distinguished it from a normal seniority system. 585 F.2d at 427 (Pet. App. 11). For these reasons, the panel majority concluded that the forty-five week industry service provision is a classification device different from a seniority system. 585 F.2d at 427 (Pet. App. 12).

Since the challenged provision was found not to be part of a seniority system, the panel majority held that Bryant was not required to disprove its bona fides. "Instead, the normal rule applies that 'a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.'" 585 F.2d at 427 (Pet. App. 12). The District Court's judgment was reversed and the cause remanded. Subsequently a petition for rehearing was denied.



## SUMMARY OF ARGUMENT

1. Seniority arrangements first emerged in the railroad industry in the 1880's, and became well established in that industry during the World War I period of Federal controls. In industries other than transportation, the seniority principle evolved unevenly. The advent of mass production manufacturing, the Great Depression, Government action during World War II, and the enactment of laws encouraging collective bargaining all contributed to the full development of seniority concepts. By 1963, seniority arrangements were found in virtually every collective bargaining agreement. Then, as now, seniority provisions assumed an almost infinite variety; typically length of service was qualified by variables necessitated by the character of the enterprise or the nature of the collective bargaining relationship. Nothing in the law compelled "a bargaining representative to limit seniority clauses solely to the relative lengths of service of the respective employees . . . ." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526-28 (1949).

2. This was the state of the seniority principle when Congress began its consideration of fair employment practices legislation in 1963. Nothing in the legislative history of Title VII suggests that Congress was concerned with the technical features of seniority systems. Rather Congress viewed seniority in a broad sense, that is, as a system of beneficial employment rights. It then undertook to assure that incumbent employees having such rights could continue to exercise them. *International Brotherhood of Teamsters (T.I.M.E.-D.C.) v. United States*, 431 U.S. 324, 354 (1977). The congressional judgment underlying Section 703(h) "was that Title VII should not outlaw the use of existing seniority lists and

thereby destroy or water down the vested seniority rights of employees . . . ." *Id.* at 352.

This unmistakable legislative purpose, together with Congress' apparent disinterest in the mechanics of various seniority systems, furnishes compelling evidence that bona fide seniority rules need not conform to any set standard or norm to qualify for Section 703(h)'s protections. Congress recognized the existence of seniority systems and seniority rights in Title VII. It chose to accept them as they had evolved in collective bargaining, without expressing a preference for any particular system. *Teamsters v. United States*, *supra*, 431 U.S. at 355 n.41; cf. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288 (1946). Thus, all bona fide seniority systems are protected by Section 703(h).

3. In view of Congress' clear purpose to allow for the full exercise of pre-existing seniority rights, the conclusion is inescapable that Congress meant to protect in a particular case the entire seniority system. See *Alexander v. Aero Lodge 735, Int'l Ass'n of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). "Seniority systems" are comprised of contractual rules that serve to establish and control preferential or beneficial employee rights based upon "time worked." At minimum, bona fide rules determining the scope of the seniority unit, the acquisition or loss of seniority, or the measurement of seniority within the applicable unit are immunized by Section 703(h). These seniority rules establish orders of priority among competing employees, as reflected on seniority lists, and they cannot be changed by the Courts without causing a reshuffling of seniority expectations that Congress was determined to avoid. It makes no difference whether these rules ascribe controlling effect to total length of service, or some lesser measure of time worked, because such variations in seniority principles were well known when Congress acted to protect all bona fide seniority systems in Section 703(h).



The forty-five week industry service rule for achieving permanent status governs many competitive seniority rights, including layoff, recall, "bumping" and priorities in referral for employment, as well as important beneficial seniority rights. Thus, it is "directly linked" to the seniority system (*Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978)), from which it can no more be separated than could the rule establishing separate seniority units for road and city drivers be separated from the seniority system considered in *Teamsters v. United States*, *supra*, 431 U.S. 324. The instant case demonstrates the clear danger of dissecting established contractual systems to determine whether each component, by itself, expresses the requisite fidelity to length of service. Invalidation of a particular contractual provision, not thought to be a seniority rule because it qualifies the acquisition, measurement or application of seniority, can profoundly alter employee seniority expectations.

The Ninth Circuit's effort to analogize the forty-five week industry service rule to classification devices, such as ability or educational standards, is unconvincing. The forty-five week rule is based solely on time worked, and vests in employees certain defined expectations. It has nothing in common with classification devices used by employers to inform their discretion in employee selection decisions. Like seniority rules generally, the forty-five week rule limits the Employers' discretion to pick and choose among employees. Equally unconvincing is the Court of Appeals' suggestion that, unlike a true seniority system, the forty-five week rule can be subject to discriminatory manipulation. This suggestion relates to the "bona fides" of the seniority system; it has no bearing on whether the forty-five week rule is part of the system.

4. The Respondent's "past discrimination perpetuated" theory presupposes that the attainment of perma-

nent status is a function of continued industry employment. Not only must he show that older employees built seniority while he was allegedly excluded from the industry, but a positive correlation between length of service and the attainment of permanent status must be assumed if Bryant is to make out his claim that he would have satisfied the forty-five week rule "but for" the past discrimination he alleges. Cf. *Watkins v. United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).

In any event, the correlation between length of service and advancement to the permanent tier within job classifications is apparent from the operation of the seniority referral and plant seniority rules in the Agreement. A temporary employee's employment will become more regular as his time in the industry and seniority increase. Since the forty-five week rule is satisfied by industry, not simply establishment service, increased regularity in employment will lead to the attainment of permanent status. On this record, little more can be said than the structure of the seniority system, including the forty-five week rule, is designed to reward length of service. The Ninth Circuit erred in deciding that Section 703(h) was inapplicable without a trial. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Teamsters v. United States*, *supra*, 431 U.S. at 375.

The Court below unduly emphasized, as a supposed departure from "normal" seniority principles, the possibility that one temporary employee might be referred to an establishment where production is expanding, and complete forty-five weeks of employment in a calendar year, while another temporary employee with longer industry service might not be so fortunate and suffer layoff elsewhere. Yet this situation, which the Agreement's seniority referral rules are designed to minimize, indicates only that plant seniority can be more valuable in one area than another due to prevailing market con-

ditions. Few seniority systems provide for a fully automatic accrual of rights. Often allowances will be made for variables, such as layoffs, that serve to interrupt the accrual of seniority and delay realization of the advantages dependent thereon. Cf. *Tilton v. Missouri Pac. R.R.*, 376 U.S. 169 (1964).

5. As they have developed in collective bargaining, seniority provisions reflect various length of service criteria which are seldom absolute. *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 338-39. Variations in, and qualifications of, length of service as a controlling factor are common. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, *supra*, 337 U.S. at 526-27. Moreover, the forty-five week rule has numerous industrial counterparts (e.g., *Gerber Prods. Co.*, 12 N.W.L.B. 74 (1943)), so it cannot be considered an anomaly. Not only have the parties viewed the system challenged here as a "seniority system" (A. 27), but it is similar to seniority systems in effect elsewhere in the brewery industry. *New Jersey Brewers Ass'n*, 18 N.W.L.B. 114, 115-16 (1944). In these circumstances, the Court of Appeals' decision represents an unprecedented intrusion into private collective bargaining that Congress could not have countenanced. See *United Steelworkers v. Weber*, 47 U.S.L.W. 4851, 4854 (U.S., June 27, 1979).

## ARGUMENT

### I.

CONGRESS INTENDED TO GRANT A MEASURE OF IMMUNITY TO ALL SENIORITY SYSTEMS BY ENACTING SECTION 703(h) OF THE CIVIL RIGHTS ACT OF 1964, AND IT IS NOT FOR THE COURTS TO VITIATE THIS CHOICE BY DRAWING NARROW DISTINCTIONS BETWEEN VARIOUS CONTRACTUAL SYSTEMS ACCORDING TO THE SCOPE OF THE SENIORITY UNITS THEY ESTABLISH, OR HOW SENIORITY IS ACQUIRED OR MEASURED WITHIN EACH UNIT

#### A. Development Of The Seniority Principle In Collective Bargaining

##### 1. Emergence of Seniority

"[S]eniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry . . . ." *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949). It is unsurprising, therefore, that development of various seniority concepts has largely paralleled the growth of collective bargaining.<sup>9</sup> The seniority principle has developed unevenly. "Circumstances of some industries caused a rapid advance. Those of other industries caused a slower advance and those of still others resulted in non-use of the principle." J. Lapp, *How To Handle Problems of Seniority* 7 (1946). But, generally, events tending to threaten employment security and changes in the law have given much impetus to the growth of seniority, as unions have sought to cope with these developments through collective bargaining.

<sup>9</sup> F. Harbison, *Seniority Problems During Demobilization and Reconversion* 7 (Indus. Rel. Sect., Princeton Univ., 1944).



"Seniority first emerged in the railroad industry of the 80's, in an atmosphere of stratified opportunity and precarious tenure . . . ." Comment, *Seniority Rights In Labor Relations*, 47 Yale L.J. 73, 74 (1937). It originated in the operating crafts, spread to the shopcrafts, and then was adopted in railroad clerical agreements, after the latter employee groups became organized. J. Lapp, *op. cit. supra*, at 7-8. The evolution continued into the World War I period when, under the wartime administration of the U. S. Director General of Railroads, seniority became firmly established in the industry.<sup>10</sup> In industries other than transportation, during the prewar period and well into the 1920's, employment was characterized by rapid turnover due to voluntary resignations by employees hoping for greater opportunity elsewhere. This economic climate was not conducive to seniority implementation.<sup>11</sup>

## 2. Factors Contributing to Seniority Development

During the Depression Era, 1929-1939, economic conditions changed dramatically. The voluntary resignation rate declined until it represented only 10-15 percent of employee separations, with the remainder being involuntary layoffs and discharges.<sup>12</sup> Employment "security" rather than "opportunity" became the dominant theme of the labor market. These changes had a profound impact on collective bargaining. Two comparable studies of collective bargaining agreements disclosed that, while roughly one out of three agreements negotiated between 1922 and 1929 contained layoff restrictions, two out of three entered into between 1933 and 1939 contained such

<sup>10</sup> Comment, *supra*, 47 Yale L.J. at 74; United States R.R. Admin., General Order No. 27, May 25, 1918.

<sup>11</sup> Address by S. Slichter, *Layoff Policy*, Ninth Ann. Conf. on Ind. Rel., Univ. of Mich., April 12-15, 1939, on file U.S. Dep't of Labor Library.

<sup>12</sup> *Id.* at 1.

restrictions.<sup>13</sup> By 1937, in fact, the seniority principle had gained a strong foothold in the brewery industry among others. Comment, *supra*, 47 Yale L.J. at 74 n.6.

Also contributing to the evolutionary growth of seniority was the emergence of mass-production industries having simple, mechanized processes that created a demand for semi-skilled and easily replaced labor.<sup>14</sup> Factory workers lack the security that comes from the possession of a special skill, and their job-oriented training is not readily transferable to different enterprises. Thus, increased union activities and organizational success were followed by wide adoption of seniority arrangements in manufacturing labor agreements.<sup>15</sup> This process accelerated after the Wagner Act<sup>16</sup> became law in 1935, and continued through World War II under conditions of expanding output and employment. Millions of workers in important industrial sectors became covered by collective bargaining agreements containing seniority provisions. See J. Lapp, *op. cit. supra*, at 9; R. Aronson, *Layoff Policies and Practices*, at 9 (Indus. Rel. Sect., Princeton Univ., 1950).

The trend toward affording seniority protections received encouragement from statutory reemployment rights for veterans. Selective Training and Service Act of 1940, § 8, 54 Stat. 840, as amended, 38 U.S.C. § 2021 (1976). Decisions by the National War Labor Board directing the acceptance of seniority clauses, including

<sup>13</sup> *Id.* at 2.

<sup>14</sup> A. Mowatt, *Seniority Provisions In Collective Agreements*, at 1 (Dep't of Labor, BLS 1938).

<sup>15</sup> *Id.* at 2. See also Taylor, *Seniority Concepts*, in "Arbitration Today" 129, 133 (Proceedings of the Eighth Ann. Meeting, National Academy of Arbitrators 1955).

<sup>16</sup> National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-60 (1976). Seniority has long been held a mandatory subject of bargaining under the Act. E.g., *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d Cir. 1941).



some very similar to the contract provisions in issue here, also influenced adherence to the seniority principle.<sup>17</sup> E.g., *New Jersey Brewers Ass'n*, 18 N.W.L.B. 114 (1944); *Gerber Prods. Co.*, 12 N.W.L.B. 74 (1943). In 1947, Congress abolished the closed shop.<sup>18</sup> Unions that had earlier controlled hiring, and had rejected seniority in favor of work-sharing among their members, thereafter found it expedient to develop seniority arrangements.<sup>19</sup>

### 3. Modern Seniority Arrangements

By the early 1960's, the seniority principle had become so important that it was embodied in virtually every collective bargaining agreement. B. Aaron, *Reflections On The Legal Nature And Enforceability Of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962). Then, as now, "seniority provisions assume[d] an almost infinite

<sup>17</sup> Slichter, Healy & Livernash, *The Impact of Collective Bargaining On Management* 105 (1960).

<sup>18</sup> Labor Management Relations Act of 1947, § 8(a)(3), 61 Stat. 140, 29 U.S.C. § 158(a)(3) (1976).

<sup>19</sup> The building trades unions in the construction industry were among the last to adhere to the seniority principle. See Note, *Seniority Clauses In Labor Contracts*, 32 Iowa L. Rev. 107, 108 (1946). The first seniority system in the construction industry was established on April 2, 1948, when the International Brotherhood of Electrical Workers, Local 134, entered into an area agreement with the Electrical Contractors Association of Chicago, providing for the referral of craftsmen who had established seniority in accordance with length of service criteria. See Address by L. Asher, Joint Labor-Management-Public Conf. on Seniority, Univ. of Wisc., Oct. 21, 1950, on file U.S. Dep't of Labor Library. In the following years, referral rules based on length of service were often adopted by construction trades unions, even though seniority remained less prevalent in construction than in other segments of the economy. U.S. Dep't of Labor, Bureau of Labor Statistics, *Administration of Seniority* (Bull. 1425-14), at 2 (1972). See also G. Cooper & R. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring And Promotion*, 82 Harv. L. Rev. 1598, 1602 (1969); J. Gardner, *An Overview of the Civil Rights Act of 1964 And Its Effect On Labor Organizations—A Look Ahead*, 17 Loy. L. Rev. 1, 4-5 (1970).

variety," ranging "from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity . . . ." *Id.* at 1534. This Court had recognized that "there are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority . . . ." *Aeronautical Indus. Dist. Lodge 727 v. Campbell, supra*, 337 U.S. at 526.

Relatively few "straight" seniority systems, in which length of service alone governs layoff, recall, promotional and other preferential rights, existed in the industrial sector. Far more prevalent were "modified" seniority systems, in which length of service was qualified by variables necessitated by the character of the enterprise or the nature of the collective bargaining relationship.<sup>20</sup> See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Nothing in the law compelled "a bargaining representative to limit seniority clauses solely to the relative lengths of service of the respective employees . . . ." *Id.* at 342. Indeed, this Court had held that the rights of seniority guaranteed the veteran by the Selective Service Act, § 8, 54 Stat. 840 (1940), as amended, 38 U.S.C. § 2021 (1976), must be determined by looking "to the conventional uses of the seniority system in the process of collective bargaining . . . ." *Aeronautical Indus. Dist. Lodge 727 v. Campbell, supra*, 337 U.S. at 526. There, in rejecting Campbell's claim that the seniority system's departure from strict length of service criteria violated the Act, Mr. Justice Frankfurter stated:

"To draw from the Selective Service Act an implication that date of employment is the inflexible

<sup>20</sup> J. Lapp, *op. cit. supra*, 14-29; U.S. Dep't of Labor, Bureau of Labor Statistics, *Seniority In Promotion and Transfer Provisions* (Bull. 1425-11), at 4-10 (1970). See also F. Silbergeld, *Title VII And The Collective Bargaining Agreement: Seniority Provisions Under Fire*, 49 Temp. L.Q. 288, 290-91 (1975-76).

basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which that Act refers is a part . . . ." [*Id.* at 527.]

This was the state of the seniority principle, as it had evolved in collective bargaining, when Congress began its consideration in 1963 of H.R. 7152, the bill that would eventually become Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and similar legislative initiatives. Moreover, seniority provisions that discriminated directly and invidiously on racial grounds had been declared unlawful as a breach of the bargaining representative's duty of fair representation<sup>21</sup> implied from the labor laws.<sup>22</sup> On the other hand, facially neutral seniority provisions that applied equally by their terms to all races were lawful and valid, even though they did not affirmatively undertake to remedy past racial discrimination in hiring. *Whitfield v. United Steelworkers, Local 2708*, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).<sup>23</sup>

#### B. Congress Meant To Protect Employee Rights That Had Vested Under Existing Seniority Systems

In Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976), Congress recognized the ex-

<sup>21</sup> E.g., *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951); *Brotherhood of Locomotive Firemen v. Tunstall*, 163 F.2d 289 (4th Cir.), cert. denied, 332 U.S. 841 (1947). See also *Syres v. Oil Workers, Local 23*, 350 U.S. 892 (1955), reh'g denied, 350 U.S. 943 (1956).

<sup>22</sup> National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1976); Railway Labor Act, § 2, Ninth, 45 U.S.C. § 152, Ninth (1976).

<sup>23</sup> See D. Stacy, *Title VII Seniority Remedies In A Time Of Economic Downturn*, 28 Vand. L. Rev. 487, 493 (1975), where the author concluded: "The *Whitfield* decision was considered to be the conventional wisdom by the forces who in the early sixties successfully pressed for the passage of the 1964 Civil Rights Act . . . ."

istence of seniority systems and seniority rights, just as it had in the Selective Service Act of 1940, § 8, 54 Stat. 840, as amended, 38 U.S.C. § 2021 (1976). See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288 (1946). Neither statute defines the term "seniority." Plainly, then, Congress recognized in both laws the operation of seniority systems as part of the process of collective bargaining, *Aeronautical Indus. Dist. Lodge 727 v. Campbell, supra*, 337 U.S. at 526, and chose to accept them as they stood without expressing a preference for any particular system. *International Brotherhood of Teamsters (T.I.M.E.-D.C.) v. United States*, 431 U.S. 324, 355 n.41 (1977). There is surely no indication that Congress meant for the Courts, in Title VII cases, to strike down existing systems of seniority whenever it appeared that accumulated length of service alone was not the inflexible basis for determining seniority rights.

It must be emphasized that, whether a seniority system is "straight" or "modified," whether length of service is the sole determinant of job rights or is qualified by variables agreed to in collective bargaining, employees have specific vested rights and expectations under the system. It is these rights and expectations that Congress chose to protect in Section 703(h). *EEOC v. E. I. duPont de Nemours & Co.*, 445 F. Supp. 223, 249 (D. Del. 1978). As this Court concluded in *Teamsters*:

"[T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." [431 U.S. at 353.]

This critical point serves to highlight one aspect of the error made by the Court below in striking down the forty-five week industry service requirement for achiev-



ing permanent status. The panel majority became preoccupied with an attempt to categorize the forty-five week provision, using what it thought to be an appropriate norm for determining whether the provision was a seniority system or part of a seniority system. As a result, the panel majority failed to note that the forty-five week provision is the linchpin on which the most important seniority rights of brewery employees rest. Nor did it consider that elimination of the provision would necessarily lead to a rearrangement of seniority expectations, as reflected in existing plant seniority lists and seniority referral lists maintained by Local Unions, across an entire multi-employer, multi-union bargaining unit. In short, the decision below concentrates too much on resolving, in the abstract, what a seniority system theoretically should be, and too little on the seniority rights of incumbent employees that Congress was determined to protect in Section 703(h).

Nothing in the legislative history of Title VII suggests that Congress was concerned with the technical features of seniority systems, such as the definition of the unit of seniority, acquisition of seniority, measurement of seniority within the applicable unit, or variations from cumulative length of service as the controlling determinant of seniority. Rather Congress viewed seniority in a broad sense, that is, as a system of beneficial employment rights.<sup>24</sup> It then undertook to assure that employees having such rights could continue to exercise them. *Teamsters v. United States*, *supra*, 431 U.S. at 354. The course Congress eventually took became discernible early in its consideration of fair employment practices legislation. For example, in testifying before the Senate Subcommit-

<sup>24</sup> Cf. Aaron, *supra*, 75 Harv. L. Rev. at 1540. See also F. Meyers, *Seniority As Security: A Rationale*, in 89 Monthly Lab. Rev. 127 (Feb. 1966): "The more useful analytic meaning of seniority, then, seems to be the affirmative expression of a property-like relation of the worker to a definable set of work opportunities . . . ."

tee on Employment and Manpower, AFL-CIO President Meany urged Congress to avoid the "pitfall" of affording Negroes hiring and seniority preferences to compensate for past discrimination because "no individual white worker should be penalized for past practices in which he may have had no voice."<sup>25</sup>

Like other supporters of fair employment practices legislation, Mr. Meany did not see this "pitfall" in the Senate bills under consideration.<sup>26</sup> But on the House side, where the more important H.R. 7152 had been introduced on June 20, 1963,<sup>27</sup> opponents of the bill soon "charged that it would destroy existing seniority rights . . . ." *Teamsters v. United States*, *supra*, 431 U.S. at 350. The opponents' criticisms were variously stated; however, they uniformly expressed the fear that minorities would obtain special seniority rights boosting them ahead of incumbent whites.<sup>28</sup> The following statements in the Minority Report accompanying H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), are illustrative:

"To millions of working men and women, union membership is the most valuable asset they own. It is designed to insure job security and a rate of pay higher than they otherwise would receive.

<sup>25</sup> *Hearings on S. 773, S. 1210, S. 1211 and S. 1937, Bills Relating to Equal Employment Opportunities, Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 155 (1963).

<sup>26</sup> *Id.* at 166.

<sup>27</sup> The various bills introduced in the 87th and 88th Congresses are described in summary fashion in EEOC, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 7-11 [hereinafter cited as "1964 Leg. Hist."] See also F. Silbergeld, *supra* note 20, at 293-97.

<sup>28</sup> 110 Cong. Rec. 486-88 (1964) (remarks of Senator Hill); 110 Cong. Rec. 2726 (1964) (remarks of Congressman Dowdy); 110 Cong. Rec. 5251 (1964) (remarks of Senator Talmadge); 110 Cong. Rec. 7091 (1964) (remarks of Senator Stennis).



As none knows better than the union member, himself, these two benefits are dependent upon the system of seniority the unions have followed since their inception. Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.' . . . .

"To disturb this traditional practice is to destroy a vital part of unionism. Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race . . . ." [1964 Leg. Hist. 2071.] <sup>29</sup>

After the addition of eighteen amendments, which are not pertinent to this case, H.R. 7152 passed the House on February 10, 1964. 110 Cong. Rec. 2804-05 (1964). It encountered much stiffer opposition in the Senate, including a filibuster lasting over three months. 1964 Leg. Hist. 3092. The Senate opponents also claimed that the bill would undermine vested seniority rights.<sup>30</sup> The bill's Floor Manager, Senator Clark, responded by introducing a letter, dated February 11, 1964, from UAW President Reuther maintaining that the bill's purpose was not to cause the layoff of white workers, but to make "future opportunities for employment . . . available to minorities previously discriminated against." At the same time,

<sup>29</sup> For the responses made by H.R. 7152's supporters to allay these fears, see H.R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess. (1963), in 1964 Leg. Hist. 2122, 2150; 110 Cong. Rec. 1518 (1964) (remarks of Congressman Celler); 110 Cong. Rec. 5423 (1964) (remarks of Senator Humphrey); 110 Cong. Rec. 6564 (1964) (remarks of Senator Kuchel); 110 Cong. Rec. 9113 (1964) (remarks of Senator Keating); 110 Cong. Rec. 11848 (1964) (remarks of Senator Humphrey).

<sup>30</sup> See authorities cited in note 28, *supra*.

Senator Clark introduced a rebuttal statement prepared by the U.S. Department of Justice which concluded that "Title VII would have no effect on seniority rights existing at the time it takes effect . . . ." "Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7206-07 (1964). Senator Clark then stated, "Mr. President, it is clear that the bill would not affect seniority at all . . . ." 110 Cong. Rec. 7207 (1964).

The Clark-Case interpretative memorandum, regarded as authoritative evidence of Congress' intent,<sup>31</sup> also stated that "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964). Similarly, in a series of written answers to questions proffered by Senator Dirksen as to the bill's meaning, Senator Clark indicated that "seniority rights are in no way affected by the bill . . . ." "[I]t will not require an employer to change existing seniority lists." 110 Cong. Rec. 7216-17 (1964).

Notwithstanding these assurances, it became necessary to accept amendments to the bill dealing expressly with seniority, among other subjects,<sup>32</sup> in order to secure sufficient votes to invoke cloture and end the filibuster. Known collectively as the Dirksen-Mansfield compromise, the amendments included language later enacted with minimal change as Section 703(h), 42 U.S.C. § 2000e-2(h) (1976). Senator Humphrey explained that the compromise language on seniority did "not narrow application

<sup>31</sup> *Teamsters v. United States*, *supra*, 431 U.S. at 350-51; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 759-60 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971).

<sup>32</sup> 110 Cong. Rec. 12722-24 (1964). Another troublesome area dealt with by the amendments involved racial balance or preferential treatment. *Id.* at 12723. Subsection 703(j), 42 U.S.C. § 2000e-2(j) (1976), was exhaustively considered by this Court in *United Steel Workers (Kaiser Alum. & Chem. Corp.) v. Weber*, 47 U.S.L.W. 4851 (U.S., June 27, 1979) (Nos. 78-432, -435, -436).

of the title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964). In *Teamsters v. United States*, *supra*, 431 U.S. at 352, this Court concluded that Section 703(h) was drafted to insure that H.R. 7152 would not destroy "existing collectively bargained seniority rights," as feared by the bill's opponents.

Thus, the legislative history demonstrates that neither the proponents nor the opponents of Title VII expressed any interest in the mechanics of how seniority systems operated. Not only was no particular system preferred (*Teamsters v. United States*, *supra*, 431 U.S. at 355 n.41), no particular system was even mentioned.<sup>33</sup> Congress gave no thought to the formal attributes, or modes of operation, of the many types of seniority systems that had evolved through collective bargaining. Its sole purpose was to preserve the "property-like relation of the worker to a definable set of work opportunities,"<sup>34</sup> as expressed in established, bona fide seniority rules, against attack under Title VII. This is compelling evidence that bona fide seniority rules need not conform to any set standard or norm to qualify for Section 703(h)'s protections, and that Congress intended to protect *all* bona fide seniority systems.

<sup>33</sup> The only exception appears to be the hiring hall referral system mentioned hypothetically in the Minority Report accompanying H.R. Rep. No. 914, 88th Cong., 1st Sess., 1964 Leg. Hist. 2071. As shown in Part II of this Argument, *infra* at pp. 44-46, the seniority referral mechanism in Section 5 of the Joint Board's Agreement (A. 36-41) plays an important role in assuring job security for brewery employees.

<sup>34</sup> F. Meyers, *supra* note 24, at 127.

### C. Established, Bona Fide Seniority Practices Under Which Employee Job Rights Have Vested Are Immune From Attack

#### 1. Seniority Rules Are Protected

As shown above, the measure of immunity Congress afforded "seniority systems" in Section 703(h) was the means it adopted to achieve its legislative goal of assuring that the contractually vested seniority rights of incumbent employees would not be watered down or destroyed by Title VII decrees. The conclusion is irresistible, therefore, that Congress intended to protect in a particular case the entire seniority system, consisting of all contractual rules that establish and control preferential or beneficial employee rights based upon "time worked." Obviously if the system's rules determining the scope of the seniority unit, the acquisition or loss of seniority, or the measurement of seniority within the applicable unit are voided, a reshuffling of seniority expectations is inevitable. This is the very diminution of established seniority rights that Congress so clearly wished to avoid in accordance with its determination that incumbent employees "guilty of no wrongdoing" should not be penalized. See *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 652 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 241 (1979).

As the Court below acknowledged, the Joint Board Brewery Agreement contains a "seniority system" under which employees enjoy vested seniority rights. 585 F.2d at 427 (Pet. App. 12). This much is undisputed. Important competitive priorities and eligibility for benefits are governed by seniority.<sup>35</sup> Nor can it be seriously dis-

<sup>35</sup> "Competitive status seniority" is used to determine priorities among employees for promotion, job security, shift preference, and other employment advantages. By contrast, 'benefit seniority' is used, without regard to the status of other employees, to determine the eligibility of a given employee for certain benefits, such as par-



puted that the forty-five week industry service rule for achieving permanent status is determinative of many of these seniority rights. At individual establishments, an employee's place on the classification seniority list is determined first by tier (permanent, temporary or new), and then by length of unbroken plant service within the tier (A. 30-32). Layoffs are made in seniority order from the bottom of the classification seniority list, while rehiring is accomplished in reverse order of layoff (A. 30). Bumping rights and priorities in referral for employment are held by permanent employees (A. 30, 37-38). In these circumstances, the Court of Appeals' holding that the forty-five week industry service rule is not part of the seniority system cannot be justified factually or legally.

In terms of its impact on employee seniority rights, the forty-five week rule is no different than any rule establishing the unit of seniority, determining how seniority will be acquired or lost, or measuring seniority within the applicable unit. Together with other seniority rules in the Joint Board Agreement, the forty-five week industry service requirement establishes orders of priority governing the entitlement of employees to fundamental employment rights. These orders of priority are reflected on establishment classification seniority lists and on hiring hall referral lists in the California brewing industry. Examined in this light, it is apparent that the forty-five week rule is "directly linked" to the seniority system. See *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978). It can be no more separated from the seniority system in the Joint Board Brewery Agree-

icipation in a group life insurance plan . . . ." G. Cooper & R. Sobol, *supra* note 19, at 1601-02 n.1. By advancement to the permanent tier in their job classifications, brewery employees become eligible for supplemental unemployment benefits (R. 14, § 54) and industry vacations (R. 14, § 15). Thus, the 45-week industry service rule has implications for both competitive status and benefit seniority rights.

ment than could the rule establishing different units of seniority for road and city drivers be separated from the seniority system considered by this Court in *Teamsters v. United States*, *supra*, 431 U.S. 324.

In *Teamsters*, this Court held that a system which established separate units of seniority for city and road drivers, and measured seniority within each unit according to length of terminal service, was bona fide and protected by Section 703(h), notwithstanding any tendency to perpetuate past hiring discrimination. The Court of Appeals in the instant case distinguished *Teamsters* because it thought that the seniority system considered there was significantly different than the brewery system under attack here. 585 F.2d at 427 (Pet. App. 10). Although there are features of both seniority systems that closely resemble one another in design and operation,<sup>36</sup> this is less important for Section 703(h) purposes than the fact that the provisions complained of in both systems controlled the disposition of established seniority rights. A successful attack on the forty-five week rule in the Joint Board Agreement will have an impact on the seniority rights of incumbent brewery employees no

<sup>36</sup> For example, the modified system seniority feature of the Southern Conference Road Supplement in *Teamsters*, 431 U.S. at 332 n.10, permitted laid-off road drivers to exercise their company road seniority at a foreign terminal to bump junior employees on the road board. Former city drivers at the foreign terminal who had transferred to the road board, thereby yielding their accrued seniority, were at a significant disadvantage in this competition. Road drivers who had earlier transferred between terminals without the protection of modified system seniority (i.e., without satisfying contractual requirements, 517 F.2d at 306 n.9) also had to compete on the basis of their terminal road seniority against laid-off drivers exercising their company road seniority. Under Section 4(b) of the Joint Board Brewery Agreement (A. 30), a permanent employee laid off from one establishment may exercise industry seniority at another establishment to bump a temporary or new employee. Neither system necessarily credits all affected employees with their total length or service.



less drastic than the impact the challenge to the separate seniority units considered in *Teamsters* threatened to have on the seniority rights of road drivers. This is the crux of the error made by the Court of Appeals.

However narrowly this Court's decision in *Teamsters* is construed, it interpreted Section 703(h) as expressing "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees . . . ." 431 U.S. at 353. At minimum, this means that collectively bargained rules establishing orders of priority among competing employees, as reflected in seniority lists, cannot be stricken down by the Courts under Title VII, absent a finding that they are not "bona fide." It makes no difference whether these rules ascribe controlling effect to total length of service, or some lesser measure of time worked, in ordering priorities among employees. For such variations in seniority principles, tailored to fit specific employment situations and hammered out in collective bargaining, were already fixtures on the industrial scene when Congress enacted Section 703(h). E.g., *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. 330; *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, *supra*, 337 U.S. 521. And, as noted, Congress extended a measure of immunity to all seniority systems.

## 2. Lower Court Decisions

To be sure, some of the lower Courts have exhibited confusion, particularly in promotional and transfer situations, in determining whether particular requirements are seniority rules or not.<sup>37</sup> In *Parson v. Kaiser Alum. & Chem. Corp.*, 575 F.2d 1374, on rehearing, 583 F.2d 132

<sup>37</sup> *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-94 (5th Cir. 1978), cert. denied, 99 S.Ct. 1020 (1979). Compare *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977).

(5th Cir. 1978), cert. denied, 60 L.Ed.2d 1073 (1979), the Court of Appeals first acknowledged that rules for bidding on vacancies within departments are governed by seniority and protected by Section 703(h). It then proceeded to hold that a rule allowing transferees to bid only on entry level positions in other departments, and requiring them to occupy the bottom-level position for a ten-day trial period after transfer before becoming eligible to bid on higher level positions on the basis of plant seniority, "is a condition upon *transfer* wholly extraneous to the prevailing seniority system . . . ." 583 F.2d at 133. Initially finding that the vice of the provision is that it "gives the old seniority criterion a continuing discriminatory effect" (575 F.2d at 1388), on rehearing, the Court of Appeals sought to recover with the following reasoning:

"[T]he central problem with the system of inter-departmental transfers . . . [is] the ten-day bottom entry requirement, the result of which is that employees can use their plant seniority to bid for jobs in a new department only if they are willing to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten-day waiting period . . . ." [583 F.2d at 133.]

We will not pause to consider whether the Fifth Circuit's decision in *Parson* demonstrates fidelity to the legislative compromise in Title VII under which "management prerogatives and union freedoms . . . [would] be left undisturbed to the greatest extent possible." *United Steelworkers v. Weber*, *supra*, 47 U.S.L.W. at 4854. See also *Southbridge Plastics Div., W. R. Grace & Co. v. Rubber Workers, Local 759*, 565 F.2d 913, 916 (5th Cir. 1978). For present purposes, it is enough to note that other Courts have recognized that bidding preferences

for employees already in a department are indeed seniority rules,<sup>38</sup> and that other inhibitions on transfer between seniority or bargaining units can be integral to the seniority system and protected by Section 703(h).<sup>39</sup>

The most intensive treatment of Section 703(h) in this context was made by the Sixth Circuit Court of Appeals in *Alexander v. Aero Lodge 735, Int'l Ass'n of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). In that case, the collective bargaining agreement contained a "job equity" feature which accorded a preference in filling vacancies to employees who had previously performed the job in question. Although the agreement had been amended to provide for the use of plant seniority in competitive situations, retention of the "job equity" feature caused the system to operate somewhat like an occupational seniority system. Junior employees with "job equity" could be preferred over employees with more plant seniority. The District Court had found that "job equity" was unlawful because it perpetuated past discrimination. In reversing, the Court of Appeals held:

"With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of 'a bona fide seniority . . . system.' A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to

<sup>38</sup> *Harris v. Anaconda Alum. Co.*, 19 [CCH] EPD ¶ 9230, at 7354-56 (N.D. Ga. 1979); *EEOC v. E. I. duPont de Nemours & Co.*, *supra*, 445 F. Supp. at 247-48; *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 1187 (E.D. Pa. 1977).

<sup>39</sup> *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 72-73 (E.D. Pa. 1977).

indicate that it should stand on a different footing than traditional plantwide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.'

"Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination." [565 F.2d at 1378-79 (footnote omitted).]

There are definite parallels between the "job equity" feature in *Alexander* and the system under consideration here. Each system represents a variation from total length of service as the controlling determinant in competitive situations. Both the "job equity" feature and the forty-five week industry service rule are integral to the seniority systems of which they are a part, since they establish orders of priority among competing employees based upon time worked. They are seniority rules protected by Section 703(h) because, along with other seniority rules in the respective collective bargaining agreements, they control those job expectations and vested rights that Congress adamantly wished to preserve.

Although the status of Section 703(h) in the several Circuits is not entirely clear, no Court has gone as far in diminishing seniority protections as the Court of Appeals for the Ninth Circuit did in the instant case. Not since *Teamsters* was decided has any other Court undertaken such a fundamental restructuring of seniority rights. Yet in manifesting its intention that preferential treatment not be required by Title VII, Congress disabled the Courts from ordering the "abrogation of pre-existing seniority rights." *United Steelworkers v. Weber*, *supra*, 47 U.S.L.W. at 4857 (Blackmun, J., concurring). At the very least, this consideration weighs heavily



against the dissection of established contractual systems for the purpose of determining whether each component, taken by itself, expresses the requisite fidelity to length of service. The danger of this approach, as illustrated by the instant case, is that invalidation of a particular contract provision not thought to be a seniority rule because it qualifies the acquisition or application of seniority can, in fact, profoundly alter employee seniority expectations.

### 3. Classification Devices Contrasted

The Court below believed that the forty-five week industry service rule for the acquisition of permanent status is simply a "classification device to determine who enters the permanent employee seniority line." 585 F.2d at 427 n.11 (Pet. App. 12). It saw no difference between the forty-five week rule and any hiring or promotional policy that does not "become part of the seniority system merely because it affects who enters the seniority line." *Id.* This reasoning is unpersuasive. The forty-five week rule is based on industry service as defined in the rule itself. It is not an employment test,<sup>40</sup> a physical requirement,<sup>41</sup> a relative ability criterion,<sup>42</sup> an educational standard,<sup>43</sup> or other screening device used by employers to ascertain employee capability for hire or advancement.<sup>44</sup> Certainly there is a significant difference

<sup>40</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, *supra*, 401 U.S. 424.

<sup>41</sup> *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

<sup>42</sup> *Movement for Opportunity v. Detroit Diesel Div., General Motors Corp.*, 18 [BNA] FEP 557, 569-70 (S.D. Ind. 1978).

<sup>43</sup> *Griggs v. Duke Power Co.*, *supra*, 401 U.S. 424.

<sup>44</sup> Classification devices of this type are challengeable if they have a discriminatory impact on minority hiring and advancement. Unless the device is justified by a showing of job relatedness, its discriminatory impact is sufficient to make out a Title VII violation. "Impact discrimination" is significantly different than the "past discrimina-

between classification devices, which are used by employers to inform their discretion in employee selection decisions, and a collectively bargained system designed to limit that very discretion.<sup>45</sup> Employees have certain defined expectations under the forty-five week industry service rule; they have no rights under the classification devices to which the Court of Appeals for the Ninth Circuit thought the rule could be analogized.

### 4. Conclusion

The seniority provisions in the Joint Board Brewery Agreement, including the forty-five week industry service rule, are admittedly elaborate (R. 79) and somewhat unique. But the fact that these rules do not operate "normally" (585 F.2d at 427, Pet. App. 11) is no basis for finding that they do not constitute a "seniority system," and, in consequence, abrogating the seniority rights and expectations that incumbent employees have already earned. Had Congress intended to protect only "normal" seniority systems, or simply those providing "for incremental increases in employment rights and benefits based on length of overall service" (*id.*), both Section 703(h) and the legislative history would read differently. The Court of Appeals' fears that the forty-five week rule can be discriminatorily applied are more appropriately ad-

tion perpetuated" theory on which the instant case was tried and appealed. Disproportionate impact and job relatedness are critical issues in "impact discrimination" cases, *Dothard v. Rawlinson*, *supra*, 433 U.S. 321, while "past discrimination perpetuated" theories turn on a failure to extend a remedy for earlier acts of discrimination. See *Teamsters v. United States*, *supra*, 431 U.S. at 348. See also *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 239 (1979); *Farris v. Board of Educ.*, 576 F.2d 765 (8th Cir. 1978), for discussion of some of the legal consequences of this distinction.

<sup>45</sup> G. Cooper & R. Sobol, *supra* note 19, at 1604; B. Aaron, *supra*, 75 Harv. L. Rev. at 1534-35.



dressed to a future determination of whether the seniority system is "bona fide" than asserted as a supposed reason why the provision is not part of the system. Here the forty-five week rule is an integral part of the unique seniority system negotiated for the protection of brewery employees, and the lower Court's decision to the contrary is erroneous.

## II.

### THE COURT OF APPEALS IMPROPERLY CONCLUDED THAT THE JOINT BOARD BREWERY AGREEMENT'S FORTY-FIVE WEEK INDUSTRY SERVICE RULE SIGNIFICANTLY AND ABNORMALLY DEPARTS FROM LENGTH OF SERVICE CRITERIA WITHOUT RECORD EVIDENCE OR ANY CONSIDERATION OF THE CONVENTIONAL USES OF SENIORITY IN THE PROCESS OF COLLECTIVE BARGAINING

Part I of this Argument demonstrates that the Joint Board Brewery Agreement's forty-five week industry service requirement for achieving permanent status is a seniority rule. It establishes orders of priority among incumbent brewery employees, as reflected on seniority referral and plant seniority lists, which govern important competitive and beneficial employment rights. Accordingly, the rule is an integral part of the Agreement's seniority system and protected against attack by Section 703(h). In Part II of the Argument, we show the significant correlation between length of industry service and the acquisition of permanent status due to the interplay of the Agreement's various seniority rules. Variations from absolute length of service criteria are common in seniority rules developed through collective bargaining, and do not furnish a basis for withholding Section 703(h)'s protections. Additionally we urge that the Court of Appeals erred in deciding that the forty-five week rule was neither a seniority system nor part of a seniority

system before an appropriate factual record was made in the District Court.

### A. Sections 4 and 5 of the Agreement Establish A Combination Seniority System Which Accords Significant, If Not Always Controlling, Weight To Total Length Of Service

There is a fundamental inconsistency in the Court of Appeals' conclusion that the forty-five week industry service rule does not reward accumulated service, when the vice of the system is said to be that minority employees, formerly excluded from the industry, now cannot achieve permanent status because worsened economic conditions have made it "virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year." 585 F.2d at 424 (Pet. App. 3). Implicit in this assertion of "past discrimination perpetuated" is the assumption that nonminority employees having longer industry service—those who entered the industry under alleged discriminatory conditions before or shortly after Title VII was enacted—were able to achieve permanent status. The essence of the alleged violation is that, "but for" the past discrimination, Bryant and similarly situated minority employees would have entered the industry earlier, and, as a result, would also have attained permanent status (R. 307). Cf. *Watkins v. United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).

The elements of the alleged Title VII violation suggest a correlation between length of service and the acquisition of permanent status. To the extent Bryant alleges, as he must to establish disparate treatment, that nonminority employees who earlier entered the industry achieved permanent status ahead of newer employees,<sup>46</sup>

<sup>46</sup> Cf. R. 304, where Bryant complains of bumping preferences accorded to "old Burgermeister employees."

his theory presupposes that permanent status is a consequence of greater age in the industry. Moreover, unless it is assumed that the attainment of permanent status is essentially a function of continued industry employment, there would be no basis for concluding that Bryant would have completed the necessary forty-five weeks of employment in a calendar year to reach permanent status, even if he had not suffered the discrimination he alleges. The problem Bryant faces, therefore, is that his legal theory requires the existence of a seniority system.

The lower Court's reasoning was also flawed by the assumption that "true" seniority rights must accrue automatically over time. 585 F.2d at 427 (Pet. App. 11). It is apparent that what disturbed the Court of Appeals is the fact that permanent status is not obtained automatically, as a matter of absolute certainty, based on an employee's overall length of employment in the industry. But just as many seniority systems do not accord controlling effect to overall length of service (*Teamsters v. United States*, *supra*, 431 U.S. at 350), seniority systems do not often provide for a fully automatic accrual of rights. Frequently allowances will be made for contingencies or variables—most importantly, layoff due to illness or reductions in force—that serve to interrupt the accrual of seniority and delay realization of the advantages dependent thereon.<sup>47</sup> Cf. *Tilton v. Missouri Pac. R.R.*, 376 U.S. 169 (1964).

Under Sections 4 and 5 of the Joint Board Brewery Agreement, assuming a stable labor market, there is a reasonable certainty that permanent status will be acquired by employees as a consequence of their continued employment in the industry. As a temporary employee's industry service and seniority increase, so do his chances

<sup>47</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions, Seniority* (Bull. 908-11), at 52-53 (1949).

of achieving permanent status and with it more valuable seniority rights. This correlation between length of service and advancement to the permanent tier within job classifications is apparent from the operation of the seniority referral and plant seniority rules in the Agreement.

After advancing to the temporary tier in his classification, a temporary employee will be dispatched in accordance with his seniority ahead of all new employees and temporary employees with less industry and plant service. Upon referral, he will build plant seniority within his classification as a temporary employee in the establishment. His ability to hold, or avoid layoff, at the establishment increases in accordance with his plant seniority, in that new employees and temporary employees with less plant seniority must be laid off before him. If the temporary employee cannot hold at the establishment, he returns to the hiring hall for another dispatch on the basis of his industry service. Due to the Agreement's seniority referral rules, a temporary employee's employment will become more regular as his time in the industry increases. Since the forty-five week rule is satisfied by industry, not simply establishment service, increased regularity in employment will lead to the attainment of permanent status.

The Court below did not comment on these aspects of the Agreement. It chose instead to focus on the possibility that one temporary employee might be referred to an establishment where production is expanding, and complete forty-five weeks of employment in a calendar year at that establishment, while another temporary employee with longer industry service might not be so fortunate. 585 F.2d at 426-27 (Pet. App. 9-11). We may assume *arguendo* that this circumstance can occur, even though the Agreement's referral rules tend to minimize such occurrences by allocating dispatches in seniority order. What is difficult to understand, however, is



why the Court of Appeals regarded this contingency as such a striking departure from "normal" seniority principles.

In an industry consisting of a number of different employers, all producing the same product in competition with each other, labor demand is not necessarily constant. Rising employment at one facility may well be accompanied by falling employment at another. Despite the leavening effect of the Agreement's seniority referral rules, a temporary employee might acquire sufficient plant seniority to hold at one establishment long enough to satisfy the forty-five week rule, while other temporary employees working elsewhere might suffer interruption in the accrual of their seniority rights through layoff. But this says no more than plant seniority rights can be more valuable in one area than another due to prevailing market conditions. Accordingly, the minimal potential for randomness in the operation of the forty-five week rule complained of by the Court below does not represent any gross aberration. Rather it reflects the familiar proposition that the job security and employment rights of all employees are tied to the fortunes of their employer. Cf. *U.A.W., Local 1251 v. Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968).

Without any factual record regarding the operation of the Agreement, little more can be said than the structure of the seniority system, including the forty-five week rule, is designed to reward age in the industry, as well as plant service within seniority tiers and job classifications. The limited evidence in the record surely furnishes no basis for declaring that the forty-five week rule represents a wholesale departure from seniority principles. At least, therefore, the Court of Appeals for the Ninth Circuit erred in finally deciding the Section 703(h) issue without a trial. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The unique character of the industry, the reasons underlying adoption of the forty-five week rule in

collective bargaining, the unwritten seniority practices of the parties,<sup>48</sup> and the degree to which competitive and beneficial rights increase according to time worked,<sup>49</sup> are factual issues requiring exploration before any final decision that Section 703(h) is inapplicable can be made. Cf. *Teamsters v. United States*, *supra*, 431 U.S. at 375; *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

**B. Seniority Systems Agreed To In Collective Bargaining Often Provide For Variations From Absolute Length Of Service Criteria In Computing Seniority Rights**

When the Ninth Circuit Court of Appeals' decision is examined against a backdrop of "the conventional uses of seniority in the process of collective bargaining,"<sup>50</sup> its shortcomings become readily apparent. Seniority provisions reflect various length of service criteria which are rarely absolute. *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 338-39. Like other clauses of the collective bargaining agreement, seniority arrangements must reflect the flexibility necessary to cope with the realities of industrial life. Cf. *Humphrey v. Moore*, 375 U.S. 335, 355-58, reh'g denied, 376 U.S. 935 (1964) (Goldberg, J., concurring). No doubt for this reason agreements eschew a dogmatic, pervasive reliance on total length of service. This Court has recognized that:

"There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All

<sup>48</sup> See U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-14), *supra* note 19, at 1.

<sup>49</sup> See note 46, *supra*.

<sup>50</sup> *Aeronautical Indus. Dist. Lodge 737 v. Campbell*, *supra*, 337 U.S. at 526.



these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations." [*Aeronautical Indus. Dist. Lodge 727 v. Campbell, supra*, 337 U.S. at 526-27 (citations omitted).]

Seniority provisions are as diverse as the industrial settings in which they are found. Little purpose would be served by attempting to catalogue here all the ways length of service can be qualified by rules relating to the acquisition, measurement and application of seniority. In general terms, however, most qualifying rules fall into one or more of these categories: definitions of the unit of seniority;<sup>51</sup> provisions relating to the acquisition of seniority, such as probationary requirements, retroactivity features and status upon completion of training;<sup>52</sup> provisions stipulating how seniority can be modified or its accrual interrupted due to leaves of absence, layoff, refusals to accept promotion, and transfers or promotions out of the unit;<sup>53</sup> provisions for loss of seniority

<sup>51</sup> *Teamsters v. United States, supra*, 431 U.S. at 355 n.41; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 908-11), *supra* note 47, at 13-23; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-14), *supra* note 19, at 8-12; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-11), *supra* note 20, at 11-15 [hereinafter cited as "BLS Bull."].

<sup>52</sup> BLS Bull. 908-11, at 6-12; BLS Bull. 1425-14, at 5-7.

<sup>53</sup> BLS Bull. 908-11, at 31-45, 55-58; BLS Bull. 1425-11, at 31-34, 45-46, 50-57; BLS Bull. 1425-14, at 21-24.

due to discharge, layoff or voluntary quit;<sup>54</sup> provisions for retention or calculation of seniority in the event of mergers, plant movement or interplant transfers;<sup>55</sup> and exceptions from length of service in determining the seniority rights of union officials and other special employee groups.<sup>56</sup>

Within these broad categories, there are various provisions bearing a marked resemblance to the forty-five week industry service rule. It is not uncommon, for example, to require employees to fulfill a minimum period of actual employment within a specific time frame in order to obtain or improve seniority rights. *Gerber Prods. Co., supra*, 12 N.W.L.B. 74; *General Motors Corp.*, 22 N.W.L.B. 233 (1945); BLS Bull. 908-11, at 7. Cf. *B. F. Goodrich Co.*, 14 N.W.L.B. 306 (1944). Similarly, layoffs by seniority tier within departments have been provided for in collective bargaining agreements outside the brewery industry. See, e.g., *American Tel. & Tel. Co.*, 20 N.W.L.B. 201, 203 (1944). Although it is unusual in non-construction employment for employees to exercise seniority with different employers, the practice is not unknown. BLS Bull. 1425-14, at 3. More importantly, this seniority practice has long been accepted in the brewery industry. *New Jersey Brewers Ass'n, supra*, 18 N.W.L.B. 114.

The system under attack in the instant case has been in effect for approximately twenty-five years, and the parties have uniformly regarded it as a "seniority sys-

<sup>54</sup> BLS Bull. 908-11, at 51-54; BLS Bull. 1425-14, at 25-30.

<sup>55</sup> *Humphrey v. Moore, supra*, 375 U.S. 335; BLS Bull. 908-11, at 47-49; U.S. Dep't of Labor, Bureau of Labor Statistics, *Plant Movement, Transfer and Relocation Allowances* (Bull. 1425-10), at 16-18 (1969).

<sup>56</sup> *Ford Motor Co. v. Huffman, supra*, 345 U.S. 330; *Aeronautical Indus. Dist. Lodge 727 v. Campbell, supra*, 337 U.S. 521; BLS Bull. 908-11, at 23-29; BLS Bull. 1425-14, at 9-12.

tem" (A. 27). It bears a close similarity to systems in effect elsewhere in the brewery industry which have been recognized as "seniority systems." *New Jersey Brewers Ass'n, supra*, 18 N.W.L.B. at 115-16. Variations in, and qualifications of, absolute length of service criteria are common. The very provision held not to be a "normal" seniority rule by the Court below has numerous industrial counterparts, so it cannot fairly be viewed as an aberration. Under these circumstances, the decision of the Ninth Circuit Court of Appeals represents an unprecedented intrusion into the private collective bargaining process that Congress could not have countenanced. See *United Steelworkers v. Weber, supra*, 47 U.S.L.W. at 4854. For in dealing with seniority issues, Congress always has been most careful to avoid unnecessarily "interfering with and disrupting the usual, carefully adjusted relations among . . . employees . . . ." *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273 (1958). Title VII represents no exception.

### CONCLUSION

The decision of the Court below, holding that the forty-five week industry service rule is not part of the Agreement's seniority system, strikes at the heart of the system under which the choicest jobs and the greatest protections against layoffs are allocated. *Teamsters v. United States, supra*, 431 U.S. at 349. For this reason, and others set forth above, the decision of the United

States Court of Appeals for the Ninth Circuit should be reversed.

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Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

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No. 78-1548  
October Term, 1979  
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CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*  
  
vs.  
  
ABRAM BRYANT,  
*Respondent.*

\_\_\_\_\_  
**On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit.**  
\_\_\_\_\_

**Reply Brief of Petitioners California Brewers  
Association and California Breweries.**  
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## SUBJECT INDEX

	Page
Introduction .....	1
I.	
Realistic Judicial Standards Immunizing the Basic, Customary "Ground Rules" of Seniority Do Not Require Immunization of Non-Seniority Classification Devices .....	6
II.	
Respondent Underestimates the Utility of Judicial Standards Designed to Determine Whether a Seniority System Is Bona Fide or Whether There Is Disparate Treatment of Minority or Female Employees .....	10
Conclusion .....	16

## TABLE OF AUTHORITIES CITED

Cases	Page
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) .....	7, 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .....	4, 8, 9
Humphrey v. Moore, 375 U.S. 335 (1964) .....	6
Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, on rehearing, 583 F.2d 132 (5th Cir. 1978) .....	5
Teamsters v. United States, 431 U.S. 324 (1977) .....	10, 11, 12, 13
Watkins v. United Steel Workers, 516 F.2d 41 (5th Cir. 1975) .....	11

### Statute

Sec. 703(h), Title VII of Civil Rights Act of 1964 .....	1, 4, 6, 9, 12, 14, 15, 16
--	----------------------------

### Textbook

Aaron, Benjamin, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev., pp. 1532, 1540 .....	16
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## Introduction.

Although the concept of the seniority system is difficult to define with precision, the parties and their amici reached consensus on a surprisingly large number of issues.

First, all parties and amici would extend Section 703(h) immunity to "ground rules" governing the application of seniority. Respondent defines such ground rules in vague terms: "Rules that define seniority and how it is calculated (including the unit in which it accrues, how it can be lost, etc.) or which affirmatively state to which decisions it applies, should be



considered parts of the system.” Respondent’s Brief, p. 8.<sup>1</sup>

Although the employers have avoided the dubious attempt to forge a highly imprecise term into an inflexible definition, Respondent’s approach is easily reconciled with the employers’ previous enumeration of the different types of seniority ground rules.

“The standard of ‘time served’ or ‘seniority’ may involve any or all of the following:

“(1) There may be rules on how ‘seniority’ or ‘time served’ is accumulated. In this context, the standards usually attempt to define what kinds of time count for purposes of accumulating seniority. . . .

“(2) There may be rules on how accumulated seniority is lost. . . .

“(3) There may be rules on how accumulated seniority is reinstated or regained. . . .

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<sup>1</sup>Respondent made several attempts to define his concept of a seniority system:

“By focusing on length of service as an essential element of seniority, we do not mean to imply that that element, standing alone, constitutes the definition of a ‘seniority system’, only that any definition of seniority system must, at a minimum, contain that element.”

Respondent’s Brief, p. 20, n.9

“A seniority system consists of the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. Rules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection or by asserting the application of non-seniority principles to personnel decisions are outside the system. Provisions ‘which define seniority and its methods of calculation’ include those that specify the unit in which seniority is acquired and the situations in which it is lost or regained.” [Emphasis original]

Respondent’s Brief, p. 33

“(4) There may be rules on how accumulated seniority is transferred, as when an employee transfers from one department or plant to another. . . .

“(5) Finally, there may be rules on how accumulated seniority is applied to particular employment decisions. These rules might involve the types of employment decisions and job benefits that are governed by the seniority principle. . . . The rules might also dictate the manner in which seniority is applied in combination with other standards such as a supervisor’s evaluation, a productivity standard, or any number of other possible factors. . . .”

Brief of Petitioners, California Brewers Association and California Brewers, 26-27

Second, all parties understand that principles governing the operation of seniority interact with other provisions in collective bargaining agreements. Moreover, even Respondent concedes that in analyzing this interaction, the seniority system must be analyzed as an integrated whole:

“Certainly the congressional intent to let *bona fide* operation of the seniority principle stand, despite temporary perpetuation of some legacies of past discrimination, would be frustrated if ‘seniority system’ were construed as narrowly as Defendants claim the Ninth Circuit construed it. If each contractual provision could be examined separately according to the criterion of whether it, by itself, grants preferences that accumulate over time, then the narrow § 703(h) exemption would have little meaning at all, because most basic rules governing application of the seniority principle would be excluded.” [Emphasis original]

Respondent’s Brief, pp. 30-31

Third, none of the parties seeks to unravel or circumvent basic principles of Title VII, such as the lessons of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Contrary to the assertions of Respondent and his amici, the employers have never contended that academic requirements, tests, supervisors' evaluations, experience tests or other devices completely unrelated to seniority standards should be immune under the seniority provisions of Section 703(h). To be sure, rules which "mix" seniority and non-seniority factors and which limit the weight of seniority must be viewed as part of the seniority system. For instance, many layoff procedures are based on numerical ratings that assign points for time served and points for ability as evaluated by a supervisor. The provisions that govern the measurement and calculations of seniority and which assign weight to the seniority factor must be immunized if Section 703(h) is to have any meaning at all. However, to the extent that the operation of an ability evaluation system can be analyzed separately, the seniority provisions of Section 703(h) have no applicability or relevance.

In light of this unexpected consensus it may be easier to resolve the remaining issues respecting the brewery seniority system. The 45-week requirement falls squarely within any reasonable definition of "seniority ground rules". The rule is a measure of time served.<sup>2</sup>

<sup>2</sup>The Brief for the United States challenges the idea that a rule governing the acquisition of job rights is a "seniority" rule because it is some measure of time served. More specifically, the Government offers the following critique of the 45-week requirement: "By requiring that the time served be within a given period of time, the vice in both instances is that no credit is given for the employee's previous or cumulative service." Brief of the United States, p. 25.

However, the Government does not adhere to the critique faithfully. First, the Brief concedes that probationary periods

It is a rule which governs the application, acquisition and maturation of seniority rights.<sup>3</sup> It is one of many rules in the contract that advantage incumbents over non-incumbents. In short, although Respondent protests that, standing alone, the rule does not result in an "ordinal ranking of employees" based on "an objective, non-manipulatable standard" (Respondent's Brief, p. 15), it cannot be denied that it does so when viewed in the context of other contract provisions.

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or separate seniority tiers are permissible: "A seniority system may provide for the acquisition of rights in stages, defined by minimum periods of service . . . so long as the acquisition of these rights is based primarily on cumulative length of service. . . ." *Id.*, p. 27, n.20. Thus, if the 45-week requirement was not tied to a restriction that the period must be completed in one year, it would be a seniority system.

Even this admission is not the whole story of the Government's position, since the Brief also admits that a seniority system may give "reasonable recognition to continuity of satisfactory service." *Id.*, p. 36.

In reality, therefore, the Government would permit the definition of the seniority system to depend on a court's second-guessing the reasonableness of specific contractual provisions. Thus, 45 weeks is a seniority provision. However, 45 weeks in one year is not. Forty-five *days* in one year or 45 weeks in two years may or may not be a seniority provision depending on a particular court's view of "reasonable recognition to continuity of service." This is precisely the type of judicial interference with collective bargaining that federal labor law has attempted to minimize.

<sup>3</sup>Respondents and their amici rely on *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, *on rehearing*, 583 F.2d 132 (5th Cir. 1978), for the proposition that a trial court may subject individual elements of a seniority system to independent examination to determine in appropriate instances that an element is not part of a seniority system. The employers contend that the *Parson* holding on this issue is erroneous, for the same reasons that the Ninth Circuit erred in the case at bar.

Moreover, *Parson* was decided after the development of a full factual record which included substantial evidence that the seniority system in that case was not bona fide.

Finally, respondent does not squarely confront the employers' contention that the Ninth Circuit erred by summarily deciding the seniority issue without affording the employers an opportunity to introduce evidence concerning the history, operation and purposes of the brewery industry seniority system. The Court of Appeals rendered its opinion prior to the development of any record, except the collective bargaining agreement itself. Moreover, the holding of the appellate court purports to foreclose further litigation of whether the 45-week requirement is part of the brewery seniority system. For this reason alone, the Opinion of the Ninth Circuit must be reversed.

# I.

## **Realistic Judicial Standards Immunizing the Basic, Customary "Ground Rules" of Seniority Do Not Require Immunization of Non-Seniority Classification Devices.**

The employers do not contend that Section 703(h) should be allowed to protect tests and academic requirements and similar classification devices. The employers argue only for a realistic approach, based upon recognition of the fact that each seniority system is unique and the product of negotiation and compromise in a specific industrial context.

A seniority system is a set of rules that creates differing degrees of preferential rights among employees based upon a standard of time served. Such rights may involve "competitive status" seniority or "benefit" seniority. *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). Congress has chosen not to define the parameters of that term because national labor policy

leaves to management and labor the freedom and flexibility to articulate individual systems crafted to specific industrial settings. Indeed, this Court has repeatedly chosen to preserve the integrity of seniority systems and to create remedies for employment discrimination without dissecting and dismantling collectively-bargained systems. See *Franks v. Bowman*, 424 U.S. 747 (1976).

Seniority cannot be defined by cataloguing and categorizing the myriad of different features that might appear through negotiation and compromise in seniority systems. It is best understood and analyzed by reference to its purpose: to advantage incumbents over non-incumbents. Boiled to essentials, this is all any seniority system is designed to achieve. It is a prescribed reward for the investment of time served. Whatever job benefit is allocated by seniority, it can only be obtained by accumulation of working time.

The first step of a realistic approach is to ascertain whether the seniority principle operates in a specific collective bargaining agreement: whether incumbents are advantaged; whether certain job benefits are obtained or increased by working.<sup>4</sup> Then, as a second step

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<sup>4</sup>The Government misunderstands the brewery system's relationship to cumulative length of service. In one of many "improbable" hypotheticals, the Government posits the existence of: Employee A, who works 46 weeks in 1960 and two weeks per year thereafter; Employee B, who works 44 weeks per year since 1965; and Employee C, who works 46 weeks in 1976. Obviously, this hypothetical fails to account for many other factors, not the least of which is the multi-employer bargaining unit: no one attacks industry-wide seniority, and its inevitable consequence that employees at busy plants will accumulate seniority faster than employees at less prosperous breweries.

(This footnote is continued on next page)



the Court must examine the complexities and mechanics of the operation of the seniority principle. In this process, all seniority provisions must be scrutinized as an integrated whole. The final step of a realistic approach is to scrutinize the entire seniority system against the familiar and customary patterns of "ground rules" in other seniority systems. As noted above, all parties seem to agree on the necessity of this effort.

Nevertheless, the Ninth Circuit did not look at the specific way that the seniority principle operates in the brewery contract. Respondent's Brief, pp. 3, 28-29. Instead, the Ninth Circuit offered only theories regarding potential manipulation and, to borrow Respondent's phrase, "a few sentences near the end of the opinion" asserting in a most conclusory fashion that the 45-week requirement is not part of the brewery seniority system. Respondent's Brief, p. 29.

Nothing in the suggested approach is excessively broad. Judicial scrutiny of an entire seniority system against the patterns of existing seniority systems throughout American industry does not require the overruling of *Griggs v. Duke Power Co.* or any other

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However, the lesson of the hypothetical is its unreality. There is simply no way that Employee C could work the 46 weeks at the same employer without an able and available Employee B also crossing the 45-week threshold. There is no reasonable chance that employees will act like Employee A, losing ground in the seniority race by working only two weeks per year.

A truly realistic model for evaluating the brewery system will compare employees equally willing to work at equally busy employers. In such a model, job benefits will increase according to cumulative length of service, and length of service will be a function of job assignments, employees' willingness to work, and an employer's business—just like any other seniority system.

well-developed principles of Title VII governing employment procedures that have a disparate impact against minorities or females. For example, a requirement that an employee have a degree or pass a test to be (i) hired, (ii) promoted, (iii) transferred between plants, departments, job classifications, or (iv) paid more is not a measure of time served, and it is not one of the patterns in seniority systems suggested as a basis for an approach to Section 703(h).

The most frequently discussed hypothetical in this case is as follows: If Temporary employees could become Permanent employees only by passing a test or attaining a degree, would this degree-test requirement be part of a seniority system? The answer is a flat no. In such a case, there would be two separate seniority systems (like separate departmental seniority systems), with job assignments and benefits distributed within each classification. In the instant case, however, the standards of time served in the form of plant and industry seniority govern throughout one integrated, tiered seniority system. An employee advances within the classifications and between classifications by working—and only by working. His rights and benefits increase according to time served, even if the "time served" is measured by a complex standard. In short, the 45-week requirement bears no resemblance to the types of classification devices appropriately subject to the standards of *Griggs v. Duke Power*.

II.

**Respondent Underestimates the Utility of Judicial Standards Designed to Determine Whether a Seniority System Is Bona Fide or Whether There Is Disparate Treatment of Minority or Female Employees.**

A substantial amount of the sound and fury directed against the employers' arguments derives from the fear that judicial standards designed to ascertain the bona fides of a seniority system will not suffice to close "a yawning gap in Title VII protection" that would supposedly be created by the employers' suggested approach. Respondent's Brief, p. 37. Respondent's fears are unwarranted for several reasons.

First, the disparate impact theory which Respondent wishes to invoke, despite *Teamsters v. United States*, 431 U.S. 324 (1977), serves also to reveal the genuine character of the 45-week provision as part of a seniority system.<sup>5</sup>

The operation of seniority appears to have two kinds of disparate impact. One kind of impact derives from contractually prescribed hurdles to the advantages of incumbency. These hurdles are different definitions of time served. As a result of these hurdles, younger, ethnically diverse groups of employees are more vulnerable to layoff and less secure in their jobs. This, of

<sup>5</sup>Respondent does not allege that the 45-week requirement had a disparate impact against Temporary minority employees as opposed to Temporary white employees. Respondent's Brief, p. 56. Respondent's disparate impact theories closely parallel the theory discussed by this Court in *Teamsters v. United States* respecting seniority systems that perpetuate the effects of past discrimination. *Teamsters vs. United States*, 431 U.S. at 349. Respondent challenges, in effect, a system because of its "allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been [employed] for the longest time", and who have thereby achieved Permanent status. *Id.*

course, was the situation in *Watkins v. United Steel Workers*, 516 F.2d 41 (5th Cir. 1975), in which younger employees, including all blacks who were hired after enactment of Title VII, were laid off as a result of declining business fortunes before the older all-white employees whose service extended farther into the past.

The second kind of impact challenged in some seniority systems derives from an employee's specific assignment or location in an employer's business—plus the specific configuration of options for transfer, promotions or progression. This location in a plant, department or job becomes the primary barrier to fulfillment of the employee's aspirations and the primary determinant of the value of the employee's seniority rights. This was the situation in *Teamsters v. United States*.

Strangely, this case appears to fall more clearly in the *Watkins*-type of seniority cases. Respondent alleges that declining business fortunes and technological changes made it difficult or impossible to become a Permanent employee, at least in Northern California. Thus, as in *Watkins*, the lack of permanent status—a form of seniority—combined with the declining business fortunes of the employers, aggravating the vulnerability of Temporary employees.

Nevertheless, it is the second line of seniority cases, including *Teamsters*, that demonstrates the misleading quality of the Ninth Circuit's pronouncement that length of service must play the dominant role in the determination of the allocation of job rights and benefits. In either case, careful examination reveals no real "gap" in Title VII's intended scope. Congress deliberately decided to limit its efforts to eradicate the injustice of employment discrimination by protecting the seniority rights of incumbents against all but the claims of



identifiable victims of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). In sum, the alleged disparate impact caused by the 45-week requirement is equivalent to the advantage held by incumbents in any number of other seniority systems. Section 703(h) represents that advantage.

In this context, Respondent's fears are unwarranted for a second reason: the dangers alleged as inherent in the "yawning gap" are really forms of intentional discrimination. These dangers are the focus of (i) the "bona fide" limitation to Section 703(h), and (ii) the prohibitions against disparate treatment embodied in Title VII.<sup>6</sup>

<sup>6</sup>Respondent and his amici adopt a definition of "seniority system" that would do great damage to existing patterns in American industry. Respondent's opinion of probationary periods is only one example.

However, this effort to rewrite customary concepts of seniority systems rests on hypotheticals, rather than any specific examples drawn from existing systems. The Brief for the United States contains the most obvious and representative examples. The Government analogizes the 45-week requirement to a hypothetical rule—which is admitted to be "improbable"—that "in order to become a permanent employee one must work seven days in one week—a rule that might well prevent an orthodox Sabatarian from ever acquiring permanent status. . . ." Brief for the United States, pp. 24-25. Later, while purporting to discuss the problem of whether the definition of a seniority unit is part of the seniority system, the Government poses still another improbable hypothetical: "Suppose . . . that an agreement provides that the seniority of all company employees is based on length of service with their particular plant, except that the seniority of sons of employees is based on their company-wide seniority." Brief of United States, pp. 25-26, n. 19. Needless to say, there is no citation to any existing seniority provision that remotely resembles these two hypotheticals.

In any case, these assignments again reflect an unwarranted lack of confidence in other Title VII principles. The seniority system must be "bona fide." As noted by this Court in *Teamsters v. United States*, as a result of the "bona fide" limitation, a plaintiff must show the system either: (i) had its genesis in racial discrimination; (ii) does not apply in an even-handed manner to all races; (iii) is irrational; or (iv) has not been

Both the Ninth Circuit and the Respondent suggest a number of hypotheses regarding the ways in which the employer can keep the number of permanent employees artificially low, allegedly keeping a pool of temporary employees available to do similar work at lesser rates of pay.<sup>7</sup> These theories ignore the specificity and comprehensiveness of the brewery provisions, and the availability of Title VII principles that would remedy real abuses.<sup>8</sup> For instance, if Bry-

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negotiated or maintained free from illegal purposes. 431 U.S. at 355-56.

The "rationality" component of this "bona fide" limitation could easily be applied against these "improbable" examples. Petitioners contend, in short, that a realistic approach to the definition of "seniority system" requires only an analysis of existing patterns in collective bargaining agreements; such an approach need not respond to every "improbable" hypothetical devised by the minds of lawyers and advocates.

<sup>7</sup>As Respondent concedes, this seniority system governs a seasonal business. When the employees do not work beyond the season, or when they work only when available work opportunities are much higher than normal, they do not become "Permanent." The fact that the seasonal employees do not become Permanent employees until they have worked beyond the season in a given year does not mean that the rules relating to the seasonal and Permanent employees are not part of the seniority system.

<sup>8</sup>The Respondent asserts untenable, conjectural allegations of potential abuse due to the 45-week requirement (Respondent's Brief, p. 22). He suggests:

"The shifting of production from one plant to another, the occurrence (sic) of illness or injury, the particular timing of a layoff or a transfer or a re-assignment—any of these serves to halt an imminent promotion."

Respondent's Brief, p. 22

Respondent admits that these risks are not unknown to "true" seniority systems. More accurately, such risks invariably exist in any seniority system. The occurrence of illness and injury is a totally personal matter which often prevents maturation of seniority, or even causes loss of seniority: it is hard to see how it could constitute race or sex discrimination. Transfer or reassignment would not interfere with seniority rights since service in the industry is the critical standard: after the transfer, service still counts toward the 45 weeks.



ant is right and he did not receive a job assignment while two lesser senior white employees were dispatched in his place, Respondent has alleged not only a breach of the collective bargaining agreement, but also a form of disparate treatment prohibited by Title VII. Nothing the employers have suggested about the scope of Section 703(h) immunity would limit the Respondent's right to recover if such allegations of intentional discrimination were proved.

Respondent also appears to misconceive the purpose and role of probationary periods. Generally, an employee serves during an initial period of time in a probationary status. The functions of the probationary period are usually limited to the following consequences: (i) The probationary employee is more susceptible to layoff if there is a reduction in the work force; (ii) A probationary employee usually has no recourse to contractual remedies, grievance procedures, or "just cause" limitations against discharge and discipline; (iii) A probationary employee usually receives less benefits than a non-probationary employee. Respondent's insinuation that probationary requirements "could . . . face a Title VII challenge if it somehow operated to discriminate against minorities" (Respondent's Brief, p. 34) seems to hint that the scope of Section 703(h) immunity ought to be governed by the potential for abuse in discipline of minority probationary employees. If a discharged probationary employee alleges that he was fired more quickly, or was judged by standards more harshly than a similarly situated white employee, he has alleged classic disparate treatment. If there is an allegation that the company has hired minorities with the intent to "weed them out" during the probationary period, thus artificially inflating the number of

minority hires while keeping the actual composition of the work force predominately white, Plaintiffs would still have real and provable allegations of disparate treatment. In that case, the process of discipline, not the probationary period, would be the focus of Plaintiff's challenge. There is simply no need to restrict the employer's ability to use a probationary period properly because of some misconceived feeling that the period might be abused in a manner that could escape scrutiny and remedy under Title VII.

In sum, the seniority protections of Section 703(h) should not be circumvented or eroded because of an unwarranted lack of confidence in the other legal principles embodied in Title VII. Potential abuses of disciplinary power, tests, performance evaluations and the like do not warrant the slow undoing of seniority systems. After all, to attain job benefits in a seniority system, an employee needs only to accumulate working time.<sup>9</sup> In such circumstances, the only obstacles to

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<sup>9</sup>The Government would limit Section 703(h) protection to systems that allocate job benefits according to cumulative length of service, thereby assuring that rights increase over time with "reasonable certainty." Brief of United States, pp. 29 *et seq.*

However, when put to the test of demonstrating why the 45-week requirement does not increase job rights with "reasonable certainty," the Government cites "fortuities" that would bar seniority accumulation in *any* system.

"[T]he 45-week rule in this case and related provisions in the agreement provide no reasonable certainty that the benefit (permanent status) will accrue fairly automatically with increased length of service; instead it depends mainly on the discretion of the employer (in deciding when and how many employees to lay off each year) or other fortuities (e.g., seasonal fluctuations in business or bumping by permanent employees)."

Brief of United States, p. 30.

The Government seems to be saying that if an employer reduces the work force or responds to fluctuations in business—as

(This footnote is continued on next page)

minorities building up working time would be either derogations of the seniority principle or techniques of intentional discrimination for which the law has ample and effective remedies.

### Conclusion.

Despite the unavoidable difficulties in developing an adequate definition of seniority systems that would accommodate and cover the many different types of systems now operating throughout the country, the unexpected consensus between the parties and their amici underscores the fact that there is a body of law, lore and experience in American industry that gives meaning and reality to the term "seniority system." Judicial scrutiny of the operation of seniority in a particular case will necessarily require reference to this

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any employer must do—this fact will affect whether a negotiated seniority system for layoffs will be entitled to Section 703(h) immunity! Evidently, if the employer acts only as a result of "incapacitating events beyond anyone's control," *id.*, p. 31, there is a "reasonable certainty" and, therefore, a seniority system. If the employer is merely acting in its "discretion," there is no reasonable certainty and, thus, no seniority system. Needless to say, the Government overlooks the fact that expectations premised on seniority systems are always dependent on the health of the employer's business. As Professor Benjamin Aaron noted in his widely-cited commentary "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev. 1532, "Seniority is a system of beneficial employment preferences; it is absolutely dependent upon the existence of an employment relationship." 75 Harv. L. Rev. at 1540. By this analysis, any legitimate interruption in the employment relationship—whether by business "fortuities" or even an employer's decision to move a plant—can interfere with or even destroy seniority rights.

The fact that these business "fortuities" are the only routine obstacles to enhancement of job rights demonstrates that the brewery system is, indeed, a seniority system.

body of law and information. The one indisputable, and undisputed, principle is that all of the ground rules of seniority must be examined and judged as an integrated whole.

In summary, this collective bargaining agreement contains an integrated, tiered seniority system; and the 45-week requirement is an integral component of the system. However, even if it is premature for this Court to undertake the suggested analysis at this particular stage of this litigation, there is no doubt that the Ninth Circuit failed to adopt a realistic approach to the scrutiny of seniority systems. As a result, the Court of Appeals rendered a premature, erroneous judgment on the character and scope of the brewery seniority system. This judgment should be vacated.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
v. *Petitioners*,  
ABRAM BRYANT,  
and *Respondent*,  
TEAMSTER BREWERY AND SOFT DRINK WORKERS  
JOINT BOARD OF CALIFORNIA, *et al.*,  
*Respondents*.

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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## TABLE OF CONTENTS

	Page
1. Congress Did Not Consider Systems Of Seniority To Be Inconsistent With Title VII's Overall Purpose To End Discrimination .....	2
2. The Applicability of § 703(h) Turns Upon Consideration Of The Entire Seniority System, Its Industrial Setting, And An Understanding Of Its Component Rules .....	7
a. The Combination Seniority System Is Designed To Operate In A Multi-Employer Bargaining Unit .....	8
b. The Objections To The System Voiced By Bryant And His Supporting Amici Do Not Place The System Outside § 703(h) .....	12
(1) Hypothesis: Industry-Senior Employees Are Not Invariably Preferred .....	12
(2) Hypothesis: The System Can Be Manipulated .....	13
(3) Hypothesis: The System Is Not Predictable .....	14
3. The Definitions Proposed By Respondent Bryant And His Amici Would, In Other Cases, Deprive Obvious "Seniority Systems" Of § 703(h) Protection .....	15
CONCLUSION .....	20

## TABLE OF AUTHORITIES

CASES:	Page
<i>A.H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945) ..	4, 5
<i>Coon v. Liebmann Breweries, Inc.</i> , 86 F. Supp. 333 (D. N.J. 1949) ..	14
<i>Cox v. Local 1273, International Longshoremen's Ass'n</i> , 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd, 476 F.2d 1287 (5th Cir.), cert. denied, 414 U.S. 1116 (1973) ..	14
<i>Franks v. Bowman Transp. Co.</i> , 424 U.S. 747 (1976) ..	3, 13, 14
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) ..	3
<i>Lodge 1424, International Ass'n of Machinists v. NLRB</i> , 362 U.S. 411 (1960) ..	4, 6
<i>International Brotherhood of Teamsters (T.I.M.E.-D.C.) v. United States</i> , 431 U.S. 324 (1977) ..	3, 4, 5, 6, 12, 13, 17
<i>Movement for Opportunity v. Detroit Diesel Div., General Motors Corp.</i> , 18 [BNA] FEP 557 (S.D. Ind. 1978) ..	14
<i>Spokane &amp; I.E. R.R. v. United States</i> , 241 U.S. 344 (1915) ..	4
<i>Trans World Airlines v. Hardison</i> , 432 U.S. 63 (1977) ..	3, 13
<i>United Airlines, Inc. v. Evans</i> , 431 U.S. 553 (1977) ..	6
<i>United Airlines, Inc. v. McMann</i> , 434 U.S. 192 (1977) ..	6

## STATUTES AND RULES:

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) (1976) :	
§ 703(a) ..	13
§ 703(h) ..	<i>passim</i>
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976) :	
§ 13(a) (2) ..	5

## TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS:	Page
110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey) ..	3
110 Cong. Rec. 15893 (1964) (remarks of Congressman McCulloch) ..	12
110 Cong. Rec. 7206-07 (1964) ..	2
MISCELLANEOUS:	
EEOC, <i>Seventh Ann. Rep.</i> , 1972 (CCH ed., Aug. 23, 1973) ..	3
Note, <i>Title VII, Seniority Discrimination, and the Incumbent Negro</i> , 80 Harv. L. Rev. 1260 (1967) ..	3
Slichter, Healy & Livernash, <i>The Impact Of Collective Bargaining On Management</i> (1960) ..	18, 19



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On Writ of Certiorari to the United States Court of Appeals  
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**REPLY BRIEF FOR THE UNION RESPONDENTS**

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The opposition briefs submitted by Respondent Bryant and his supporting amici disclose fundamental errors in their varied approaches to the issue before the Court. For purposes of this reply, we focus narrowly on three aspects of their arguments. First, we show that § 703(h) is not an exception to Title VII's general prohibitions

against discrimination. Rather it is a definitional provision whose terms, in any event, must be given their ordinary and intended meaning. Second, we cut through our opponents' theoretical arguments to demonstrate that attainment of permanent status through satisfaction of the forty-five week rule is governed by an interaction of the Agreement's industry and plant seniority rules which allocate work opportunities among temporary employees. Length of service principles are controlling. Third, we show that the definitions of "seniority system" proffered by Bryant and his supporters do not aid in resolving the issue in this case, and would produce results in other cases totally inconsistent with Congress' intent in enacting § 703(h).

**1. Congress Did Not Consider Systems Of Seniority To Be Inconsistent With Title VII's Overall Purpose To End Discrimination.**

Respondent Bryant and his supporting amici insist that tension exists between § 703(h) and Title VII's general prohibitions against employment discrimination; and that the term "seniority system" in § 703(h) must be given a narrow construction (R. Br., at 12; Gov't Br., at 38; NAACP Br., at 10-13; L. Comm. Br., at 18). Their interpretative approach discloses a fundamental misconception of Title VII in general and of § 703(h) in particular. Congress intended to tolerate *no* employment discrimination based on race, color, religion, sex or national origin by covered employers and unions after the effective date of Title VII. Neutral seniority systems were not considered discriminatory. "Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7206-07 (1964). Section 703(h) was designed to clarify Congress' understanding that differences in treatment attributable to the operation of a

bona fide seniority system were not unlawfully discriminatory. 110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey).

No tension exists between § 703(h) and the statutory scheme of which it is a part. As this Court has often recognized, § 703(h) is "a definitional provision" which, together with all other provisions of § 703, "delineates which employment practices are illegal . . . and which are not." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976); *Trans World Airlines v. Hardison*, 432 U.S. 63, 82 (1977). See also *Teamsters v. United States*, 431 U.S. 324, 346-47 (1977). There is no indication that Congress considered the existence of seniority systems and seniority rights inimical to the realization of equal employment opportunity.<sup>1</sup> Rather the legislative history discloses only the broadest possible agreement that rights accrued under bona fide seniority systems should not be disturbed. Title VII's sponsors repeatedly stated that the bill's general prohibitions against discrimination were not intended to invalidate bona fide seniority systems; § 703(h) was added to assure that this congressional intention could not be misunderstood. *Teamsters v. United States*, *supra*, 431 U.S. at 352. Accordingly, § 703(h) is not an "exemption," for it did not remove seniority systems from the sweep of statutory commands that other-

<sup>1</sup> See U. Br., at 28-32. The notion that past discrimination could be perpetuated through operation of a seniority system, applying equally to all racial and ethnic groups, surfaced 3 years after Title VII was enacted. See Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260 (1967). To say that Congress did not regard the perpetuating effects of seniority systems on *past* hiring discrimination to constitute *present* invidious discrimination involves no departure from *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that Congress intended to outlaw "impact discrimination." It has long been recognized that "perpetuation" and "impact discrimination" are two different concepts. EEOC, *Seventh Ann. Rep.*, 1972, at 13 (CCH. ed., Aug. 23, 1973); Gov't Br., at 12.

wise would have invalidated them. More accurately, § 703(h) confirmed the inapplicability of Title VII's general prohibitions to bona fide seniority systems.

For these reasons, the canon of statutory construction urged by Bryant and his amici is inapposite. Of course, exemptions from remedial legislation should be narrowly construed as a general rule. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945). But this sensible rule was formulated, and has been uniformly applied, in situations where the exemption at issue was in derogation of the main legislative purpose.<sup>2</sup> Since the preservation of seniority rights was not considered by Congress to be in derogation of Title VII's remedial purpose, it is difficult to see how the canon of construction put forth by those supporting affirmance will aid in interpreting § 703(h).

Whatever § 703(h) is called, there can be no justification for construing the words "seniority system" more narrowly than the ordinary meaning they enjoy in the collective bargaining world. This Court has recognized that the protection of seniority rights, as reflected in § 703(h), was a central commitment by congressional sponsors which "cleared the way . . . for the passage of Title VII." *Teamsters v. United States*, *supra*, 431 U.S. at 352. The essence of that commitment was "that seniority rights would not be affected, even where the em-

<sup>2</sup> E.g., *Spokane & I.E. R.R. v. United States*, 241 U.S. 344, 350 (1915). Much closer in point is *Lodge 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411, 418 n.7 (1960), where Mr. Justice Harlan declined to view the union security proviso to § 8(a)(3)'s prohibition against discrimination based on union activity, 29 U.S.C. § 158(a)(3), as being in derogation of general employee organizational rights granted by § 7 of the LMRA, *id.* § 157, stating:

"Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. . . ."

ployer had discriminated prior to the Act." *Id.* at 350. To accord § 703(h) an artificially narrow sweep would amount to "a perversion of the congressional purpose" which could not be more clearly expressed.

"[T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." [*Id.* at 353.]

This Court should decline "the invitation to disembowel § 703(h)," *id.* at 353, and construe that section with "due regard to the plain meaning of the statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, *supra*, 324 U.S. at 493. Properly read, *Phillips'* insistence on a "narrow construction" of the FLSA's retail service exemption<sup>3</sup> reflected this Court's unwillingness, absent contrary congressional intent, to afford the exemption a *broader* meaning than the normal usage of its terms in business and government warranted. Canons of statutory construction, including the principle that exemptions from remedial legislation are to be narrowly construed, aid the Courts in ascertaining legislative intent. They do not constitute rules of law authorizing the Courts to override congressional purposes.

In *Teamsters*, this Court recognized that the immunity Congress accorded to seniority systems extends to all varieties of seniority systems which existed at the time of the Act's passage. "The legislative history contains no suggestion that any one system was preferred." 431 U.S. at 355 n.41. The breadth of Congress' commitment to the preservation of established seniority rights suggests the propriety of construing § 703(h) sufficiently broadly, in light of industrial realities, to accomplish its

<sup>3</sup> Fair Labor Standards Act of 1938, § 13(a)(2), 29 U.S.C. § 213(a)(2).



intended purpose. The position we espouse finds substantial support in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), where this Court declined to give "limited effect" to the protection afforded bona fide retirement plans under the Age Discrimination in Employment Act of 1967. In "the absence of any indication of congressional intent to undermine the countless bona fide retirement plans existing in 1967 when the Act was passed," *id.* at 199, the Court concluded that a narrow construction invalidating some of the plans was not warranted. "Such a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous expression in the statute." *Id.* at 199.

In the instant case, this Court is called upon to perform the familiar task of discovering the ordinary and intended meaning of statutory language. Congress determined that Title VII would not "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."<sup>4</sup> *Teamsters v. United States*, *supra*, 431 U.S. at 353. Those rights existed in 1964 under a variety of seniority systems. *Id.* at 355 n.41. Consequently, the meaning of the term "seniority system" in § 703(h) must be ascertained in accordance with the development of the seniority principle in collective

<sup>4</sup> Of course, there can be no valid claim of perpetuation of post-Act discrimination. Post-Act discrimination is directly subject to attack. A timely claim against any such discrimination will entitle the complainant to full relief; an untimely claim of post-Act discrimination cannot be revived through the assertion that a neutral seniority system perpetuates the effects of the discrimination. *Teamsters v. United States*, *supra*, 431 U.S. at 347-48. "[T]he operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee." *Id.* at 348 n.30. See also *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); accord, *Lodge 1424, International Ass'n of Machinists v. NLRB*, *supra*, 362 U.S. 411.

bargaining. Otherwise, employee seniority rights and legitimate expectations that Congress meant to protect will be lost.

## 2. The Applicability of § 703(h) Turns Upon Consideration Of The Entire Seniority System, Its Industrial Setting, And An Understanding Of Its Component Rules.

At the outset, we again emphasize how critical accrued past service is to Bryant's "perpetuation" theory of this case (see U. Br., at 43-44). There must be a link between past work opportunities, which Bryant claims he was denied, and the attainment of permanent status through satisfaction of the forty-five week rule. If, as the lower Court reasoned, the forty-five week rule is an "all or nothing proposition," in that ability to satisfy the rule is simply a function of competition that begins anew each year (585 F.2d at 427; Pet. App. 11), then discriminatory acts in earlier years would have no effect on that ability. Bryant's Title VII claim would thus fall wholly apart from § 703(h).

To make out his claim, therefore, Bryant must establish three propositions: First, he has to demonstrate that the Agreement's industry and plant seniority provisions, which allocate work opportunities among temporary employees, and which determine who works forty-five weeks in a calendar year, operate with sufficient certainty and predictability to forge a link between his alleged denial of past work opportunities and his present inability to achieve permanent status. Second, he must somehow show that the acquisition of permanent status under the forty-five week rule does not reflect operation of seniority principles, a major inconsistency whose acceptance would deny § 703(h) protection to combination seniority systems. Third, he must convincingly show that the forty-five week rule is not part of the contractual seniority system.

Bryant cannot meet this burden. The rule is an essential feature of the Agreement's combination seniority system, in that it furnishes the means by which industry service is given partial seniority credit at the plant. Moreover, the attainment of permanent status turns directly on an interaction of the Agreement's plant and industry seniority provisions, which allocate those work opportunities determinative of who satisfies the forty-five week rule and who does not.

**a. *The Combination Seniority System Is Designed To Operate In A Multi-Employer Bargaining Unit.***

It is instructive to note that if the Brewery Agreement were applicable to a single establishment instead of a multi-employer, multi-union bargaining unit, there would be no variation whatever from cumulative length of industry service as the controlling measure of seniority rights. Employees would be referred out of the hiring hall in order of their industry service which would be the equivalent of plant service. They would accrue seniority and reach permanent status in strict order of their longevity in the industry, assuming their service was not broken. Yet the unit is not a single-plant unit, and the parties to the Agreement have determined to allow some seniority credit for time served elsewhere in the multi-employer unit. Thus, the seniority system, though it is a single, integrated system, uses a combination of plant and industry service in measuring seniority.

Our main brief sets forth in detail the operation of the combination seniority system (U. Br., at 7-13, 44-47; see also AFL-CIO Br., at 32-35), allowing us to review it briefly here. A temporary employee working under the Agreement accumulates two types of seniority. His industry seniority reflects his total accumulated length of tier service within his classification at all plants in the covered industry, while his plant seniority represents

his total accumulated length of tier service within his classification at a particular plant. Industry seniority determines the temporary employee's opportunity to secure work at any given plant. This is because an opening at any plant not filled by a permanent employee, or by a temporary employee with prior service at that plant, must be offered to the temporary employee with the greatest industry seniority. Following referral, plant seniority will determine whether the temporary employee, in competing with other temporaries within his classification, will be able to secure an available opportunity. For instance, the least plant-senior temporary will be laid off immediately after new employees, while the most plant-senior temporary will be first recalled.

If forty-five weeks of work in a calendar year is available at a plant for any temporary employee, the most senior temporary employee in classification service at that plant has the right to claim the work. Thus, plant seniority governs the opportunity to work forty-five weeks and attain permanent status at a particular plant. Of course, temporary employees need not fulfill the forty-five week rule at one plant. If a temporary employee works at a plant where he does not have the opportunity to work forty-five weeks in a calendar year, his industry seniority determines his opportunity to secure work at a second plant, or a third plant, and thereby satisfy the forty-five week rule by cumulating the time he has worked at different plants. In this manner, opportunities to attain permanent status are allocated on a length of service basis.

Under the combination seniority system, it is at least conceivable that a worker junior in industry service can reach permanent status before a more industry-senior worker and enjoy a higher seniority standing. But this possibility is not in derogation of the seniority principle, however narrowly that principle is applied. For in this situation, the industry-junior worker has succeeded in



fulfilling the forty-five week service rule by virtue of his accumulated plant service. The only way an industry-junior worker, whether black or white, could reach permanent status before one with longer industry service is for the former worker to accumulate more service than the latter during the calendar year. This occurrence, in turn, is possible if the industry-senior worker suffers layoffs for lack of work in the establishments to which he is referred, while the industry-junior worker does not. As shown, the Agreement's seniority referral rules afford industry-senior temporary employees first opportunity for available work, thus stacking the odds heavily in their favor, and minimizing the chances that industry-junior workers will achieve permanent status before them.

Once permanent status is obtained, the employee begins to accrue plant seniority in a higher seniority tier within his classification, and thereby achieves a superior ranking on the plant seniority list. In this way, the forty-five week rule furnishes the mechanism by which an employee's industry service is given partial seniority credit at the plant. The rule is one of the Agreement's provisions determining how service will be accrued and thus credited for seniority purposes. It is integral to the seniority system because, along with related rules, it furnishes the measure of seniority within the applicable unit. The *measure* of seniority, one of the basic components of every seniority system, establishes the order in which employees are ranked on the seniority list.

The Government has taken the position that furnishing the measure of seniority is not enough to qualify a contract provision for § 703(h)'s protections. Being "part of a system with seniority features" is insufficient, the Government insists; the challenged rule itself must contain "the essential elements of the seniority principle" (Gov't Br., at 19-20). While we believe this view is

erroneous, it is clear that the forty-five week rule itself is based on the seniority principle in that, as already shown, the attainment of permanent status is a function of industry and plant seniority. Total industry seniority determines who will have first opportunity to secure employment, but accumulated plant seniority (which governs layoff and recall) is the final determinant of who satisfies the forty-five week rule. In view of the multi-employer nature of the Agreement, there can be no absolute assurance that temporary employees will always reach permanent status in strict order of their industry service. Some departure from this norm is possible due to the importance of plant seniority. Yet this scarcely represents a derogation of the seniority principle because, in these situations, length of plant service is controlling. In sum, permanent status is earned by obtaining work opportunities, whose allocation is determined by an interaction of plant and industry seniority.

Obviously, the combination seniority system is better suited to the multi-employer bargaining unit than either a pure plant or pure industry system of seniority. A pure plant system would be unfair to employees with long industry service, for they would receive no industry credit at the plant, and would have to start over again at each new plant. A pure industry system would be impossible to implement without chaotic "bumping" throughout the California brewery industry.<sup>5</sup> Apart from the administrative burdens involved, such turmoil would prevent employers from retaining employees familiar with work processes, plant rules, and supervisory requirements. The combined industry-plant seniority system

<sup>5</sup> The Agreement enables permanent employees to "bump" (A. 30, § 4(b)), but bumping is limited by the fact that permanent employees are the last to be laid off. "Bumping" would increase drastically under a pure industry seniority system applicable to current temporary employees.



actually chosen is designed to accommodate the many interests of the parties to the Agreement. It is rational for a multi-employer unit and accords with industry practice. *Teamsters v. United States*, *supra*, 431 U.S. at 356.

**b. *The Objections To The System Voiced By Bryant And His Supporting Amici Do Not Place The System Outside § 703(h).***

(1) *Hypothesis: Industry-Senior Employees Are Not Invariably Preferred.* A repeated theme in our opponents' briefs is that the system does not reward "cumulative service" because it is possible for an industry-junior employee to achieve permanent status ahead of an industry-senior employee. Industry-senior employees are afforded referral priorities based on their industry service that serve to minimize this possibility. To the extent it does occur, the reason is attributable to the importance of plant seniority, and not because some non-seniority factor has been injected.<sup>6</sup> This Court has twice held that a seniority system can be protected by § 703(h), even though it does not allocate work opportunities on the

<sup>6</sup> The Government maintains that the sole objectionable aspect of the system is that 45 weeks of employment must be earned in one calendar year (Gov't Br., at 27 n.20), and suggests the system would be protected by § 703(h) if total industry service (regardless of when worked) were credited toward satisfaction of the 45-week rule. This view makes little practical sense; it is a construct without basis in the statute or collective bargaining experience. Even if the Government had its wish, in view of the nature of the multi-employer bargaining unit, and the interaction of the Agreement's combined plant-industry seniority rules, there could be no assurance that employees would reach permanent status in order of their industry length of service. The Government's value judgment on this point dramatizes its confusion of "longevity" and length of service seniority principles. It brings to mind Congressman McCulloch's statement on the eve of Title VII's passage: "The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees." 110 Cong. Rec. 15893 (1964).

broadest possible basis. *Teamsters v. United States*, *supra*, 431 U.S. 324; *Trans World Airlines v. Hardison*, *supra*, 432 U.S. 63.

(2) *Hypothesis: The System Can Be Manipulated.* The simple answer to our opponents' contention that the system is "manipulatable" is found in § 703(a) of the Act. Racial manipulation constitutes direct discrimination, and can be remedied without disturbing the seniority system. *Franks v. Bowman Transp. Co.*, *supra*, 424 U.S. at 758. The system is protected by § 703(h); its abuse is not protected at all. Besides, the methods of manipulation hypothesized by Bryant are not only far-fetched, they could be used to circumvent any seniority system. The Government's opinion, Br., at 31, that interruptions in the accrual of seniority—caused by layoff under the system in question—should essentially be within employee control is totally unrealistic in light of actual collective bargaining practices (U. Br., at 47-50; AFL-CIO Br., at 15-20).

Relying on the lower Court's opinion, Bryant suggests that production could be shifted from one plant to another by an employer (R. Br., at 22). This surely would be an exceptionally expensive and unrealistic way to discriminate. Moreover, it would not succeed. Unless the shift coincided with a significant drop in production, the seniority referral rules would assure that the most industry-senior temporary employees would have first opportunity to secure the shifted work. With deference to the lower Court (585 F.2d at 427; Pet. App. 11), we simply cannot see how the Agreement can be intentionally manipulated to the detriment of minority workers without violating its seniority provisions, as well as its equal opportunity clause (R. 14, § 55).

Another area of potential manipulation, pointed to by the NAACP (Br., at 49-51), is supposedly found in § 5 (c) (2) of the Agreement, which allows an employer to

reject a referred employee not having recall rights under § 5(c)(1). Temporary workers are referred out of the hiring hall to different employers in accordance with their industry seniority pursuant to work orders for specific numbers of employees (A. 38, 41). There is no gang system under which employers pick and choose among a surplus of employees. If an employer finds a referred individual inappropriate for employment (e.g., due to prior unsatisfactory work), it may reject him and secure another employee from the hiring hall in accordance with industry seniority.<sup>7</sup> A discriminatory rejection under § 5(c)(2) would be remedied in accordance with *Franks* by formulating a "rightful place" remedy for the victim. But this does not affect the system's status under § 703(h). It indicates only that an ability determination that overrides seniority is not protected by § 703(h).<sup>8</sup>

(3) *Hypothesis: The System Is Not Predictable.* Our discussion of the system and its operation demonstrates that it establishes orders of priority to govern competition among brewery employees. These orders of priority, reflected on plant seniority lists and seniority referral lists, vest in employees reasonably well-defined employment expectations. Bryant's main objection is that temporary employees cannot predict with precision when they will attain permanent status (R. Br., at 22-23). This inability, however, is not attributable to the forty-five week rule, but to the scope of the bargaining unit and the manner in which work opportunities are allocated.

<sup>7</sup> These facts distinguish *Cox v. Local 1273, International Longshoremen's Ass'n*, 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd, 476 F.2d 1287 (5th Cir.), cert. denied, 414 U.S. 1116 (1973), and show that the possibility of rejection under § 5(c)(2) is an "ordinary uncertainty" familiar to every employment situation. 343 F. Supp. at 1299. *Cox* has no bearing on the Brewery Agreement. See *Coon v. Liebmann Breweries, Inc.*, 86 F. Supp. 333 (D. N.J. 1949).

<sup>8</sup> E.g., *Movement for Opportunity v. Detroit Diesel Div., General Motors Corp.*, 18 [BNA] FEP 557, 569-70 (S.D. Ind. 1978). See also AFL-CIO Br., at 24 n.10.

Furthermore, no seniority system affords absolute certainty and predictability. The economic vitality of his employer, career choices of employees with greater seniority entitlement, automation and similar considerations all affect an employee's prospects. A seniority system establishes priorities based on service time as between employees and insulates employees from decisions by their employer based on other, less certain criteria (AFL-CIO Br., at 20-21). The system involved here accomplishes these goals, and tempers absolute predictability no more than is required by industrial realities.

### 3. The Definitions Proposed By Respondent Bryant And His Amici Would, In Other Cases, Deprive Obvious "Seniority Systems" Of § 703(h) Protection.

The difficulty in adopting a firm definition of the term "seniority system" is illustrated by Respondent Bryant's attempt to do so (R. Br., at 33). His proposed definition would include "the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. . . ." So stated, Bryant's definition supports our position. The forty-five week rule, and the means by which it is fulfilled, quite clearly define "seniority and its methods of calculation" in the California brewery industry.

The seniority principle is not susceptible to definition in abstract terms. Its nature can only be described generally, since the specific form and content of seniority rights are supplied at the bargaining table, and reflect the interests brought to the table by the parties. The correct approach to construing the meaning of "seniority system" used in § 703(h) requires an examination of the system at issue to identify the rules that establish or



control orders of priority among competing employees based on time worked. Adoption of this functional approach, instead of the highly theoretical, value-laden test proposed by Bryant and his amici, will yield several distinct advantages: (1) It is more faithful to the congressional judgment to protect all seniority systems without preferring any particular system. (2) Employee seniority rights and expectations will not be destroyed by exclusion of a rule which profoundly affects seniority rights, but which does not meet abstract definitional criteria. (3) It recognizes the infinite variety of seniority systems that already exist, and will not force management and labor to conform future systems to a particular norm, or otherwise inhibit the flexibility of collective bargaining.

To say that the seniority principle cannot be precisely defined, however, does not mean that its general nature cannot be described. A seniority system has two basic components: the measure of seniority and a definition of which employees are eligible to compete based on that measure. Various rules deal with each component. Rules dealing with the measure of seniority determine how service will be credited for competitive and beneficial seniority purposes. Among these rules are those which determine the type of service to be credited (e.g., company, plant, departmental or job service), how service time is to be calculated or accrued for seniority credit, when seniority begins, and when it is lost or its accrual interrupted. Like the forty-five week rule, and the plant and <sup>industry</sup> seniority rules through whose interaction permanent status is attained, rules dealing with the measurement of seniority determine rankings on seniority lists.

As we understand their submissions, Bryant and his supporters would leave outside the protections of § 703

(h) the rules in a seniority system that define which employees are eligible to use their seniority to compete for a given employment opportunity. Thus, Bryant urges that "[r]ules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection . . . are outside the system" (R. Br., at 33 (*italics removed*)). This aspect of Bryant's definition is deeply troubling. After all, without the rules that determine who may compete there is no system. There is only a measure that can have no application without a known field of competitors.

Of necessity, all seniority systems have some limitation on the field of eligible competitors. In some systems, the determination of eligibility to compete is implicit in the measure of competition. For example, where the measure is departmental seniority, eligibility to compete is by definition limited to the members of a given department;<sup>9</sup> where the measure is job seniority, eligibility is limited to those holding a particular job. We suspect Bryant and his supporters would not seriously contend

<sup>9</sup> In a departmental system, after all those within a department have exercised their respective seniority rights an opening will result, generally in a bottom level job in the department. *Teamsters* itself describes this basic phenomenon:

"For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining-unit seniority that controls. Thus, a line driver's seniority, for purposes of bidding for particular runs and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal. *The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line drivers' 'board'.*" [431 U.S. at 343-44 (*footnotes omitted, emphasis added*).]

Normally, departmental seniority systems will include a set of seniority rules for filling the resulting vacancy in the entry-level job in a department (e.g., employees in all other departments might be eligible to compete for it based upon their plant seniority).



that in a departmental or job seniority system the limitation on eligibility to compete implicit in the measure of seniority is not part of the "seniority system" for purposes of § 703(h).

In some seniority systems, the field of eligible competitors is not determined by the applicable measure of seniority. For instance, when Congress enacted Title VII in 1964, there was an apparent "trend . . . toward the use of a single seniority date, usually the date of hire in the company or plant, regardless of the units of seniority application. Ranking within any given unit by date of original hire in the company is becoming more prevalent." Slichter, Healy & Livernash, *The Impact of Collective Bargaining On Management* 117 (1960). This trend has continued. In many industries, unions and employers have negotiated seniority systems in which the departmental unit structure is maintained but within that structure competition takes place on the basis of plant or company seniority. For all except entry-level opportunities in a department, the field of eligible competitors is limited to the incumbent employees in that department; but the measure of seniority for competitions within the department is plant, not departmental, seniority.

Adoption of such systems in complex manufacturing industries enable employers to maintain the safety and efficiency associated with departmental seniority systems, while allowing for greater employee mobility within plants and greater security for longer service employees. They provide more opportunity than would a pure departmental system for an employee transferring from outside a department to advance rapidly to higher level jobs within his new department, since the transferring employee is able to use his total plant service (including the time he spent in his prior department) for competitive purposes within the new department.

It should be manifest that a decision in collective bargaining to utilize a departmental unit structure, but to employ plant seniority as the measure within that structure, is protected by § 703(h) in the same manner as if the measure chosen had been departmental seniority. Whether the system be a pure departmental seniority system, or a plant seniority system where the unit of seniority application is the department, the point for purposes of § 703(h) is that protection of the vested seniority rights of employees requires protection of the fundamental components of the system. That is to say, § 703(h) must be understood to cover the rules establishing the field of eligible competition—those specifying particular jobs or departments as units of seniority application—in addition to rules governing the seniority measure of competition.

The definitions of "seniority system" proffered by Bryant and his supporters will not provide that coverage. For example, in the plant-seniority-within-department system described above, their definitions would leave unprotected employee seniority expectations based on the limitation of the field of eligible competitors to those within the given departments. Contrary to the legislative purpose, and without any warrant in the legislative history, they would have this Court attribute to Congress the "common error" of "failure to think in terms of the total system." Slichter, *et al.*, *op. cit. supra* at 154.

**CONCLUSION**

For the reasons set forth above, and in our main brief,  
the decision below should be reversed.

Respectfully submitted,

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FOR ARGUMENT

No. 78-1548

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1979**

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**CALIFORNIA BREWERS ASSOCIATION, ET AL.,  
PETITIONERS**

**v.**

**ABRAM BRYANT**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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# INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	2
Statutory provision involved .....	2
Interest of the United States .....	3
Statement .....	3
1. The complaint .....	3
2. The challenged provisions of the collective bargaining agreement .....	5
3. The decisions below .....	9
Introduction and summary of argument .....	12
Argument:	
I. The fact that rules or practices may be related to a system with true seniority features is not a sufficient basis for concluding that those rules or practices constitute a "seniority system" entitled to the immunity of Section 703(h) .....	17
II. The challenged 45-week rule is not a seniority system under Section 703(h) because the accrual of rights does not depend primarily on cumulative length of service .....	23
III. The term "seniority system" in Section 703(h) should be narrowly construed in view of the broad remedial purposes of Title VII .....	38
Conclusion .....	39

## II

### CITATIONS

Cases:	Page
<i>A. H. Phillips, Inc. v. Walling</i> , 324 U.S. 490	17, 38
<i>Abbott Laboratories v. Portland Retail Druggists Assn.</i> , 425 U.S. 1	38
<i>Aeronautical Industrial District Lodge 727 v. Campbell</i> , 337 U.S. 521	33, 35
<i>Alabama Power Co. v. Davis</i> , 431 U.S. 581	29, 31, 32
<i>Alexander v. Aero Lodge 735, International Assn. of Machinists</i> , 565 F.2d 1364, cert. denied, 436 U.S. 946	15, 21
<i>Dothard v. Rawlinson</i> , 433 U.S. 321	12
<i>East Texas Motor Freight System, Inc. v. Rodriguez</i> , 431 U.S. 395	25
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330	33, 35
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747	25, 27, 28
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424	11, 12, 19, 38
<i>Group Life &amp; Health Ins. Co. v. Royal Drug Co.</i> , No. 77-952 (Feb. 27, 1979)	17, 38
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324	12, 13-14, 21, 27, 27
<i>McKinney v. Missouri-K.-T. R.R.</i> , 357 U.S. 265	29-30, 34
<i>Parson v. Kaiser Aluminum &amp; Chemical Corp.</i> , 575 F.2d 1374, on rehearing, 583 F.2d 132	15, 20-21
<i>Patterson v. American Tobacco Co.</i> , 586 F.2d 300, pending rehearing en banc (Nos. 78-1083, 78-1084)	15, 20, 21

## III

Cases—Continued	Page
<i>Peyton v. Rowe</i> , 391 U.S. 54	38
<i>Tilton v. Missouri Pacific R.R.</i> , 376 U.S. 169	30
<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553	26, 36
<i>United Steelworkers v. Weber</i> , No. 78-432 (June 27, 1979)	17
<i>Vaca v. Sipes</i> , 386 U.S. 171	14
Statutes:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e <i>et seq.</i>	4, 12
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1)	12
Section 703(h), 42 U.S.C. 2000e-2(h)	passion
Military Selection Service Act, Section 9, now codified at 38 U.S.C. 2021	28, 32, 37
29 U.S.C. 159(a)	11, 15
29 U.S.C. 185(a)	11, 15
42 U.S.C. 1981	4, 15
Miscellaneous:	
110 Cong. Rec. 7207, 7213, 7217 (1964)	28

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A) is reported at 585 F.2d 421. No opinion was rendered by the district court.

**JURISDICTION**

The judgment of the court of appeals was entered on November 3, 1978. A timely petition for rehearing was denied on January 11, 1979. The petition for



a writ of certiorari was filed on April 11, 1979, and was granted on June 4, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

The United States will address the following question:

Whether a provision in the collective bargaining agreement in the California brewing industry, whereby an employee who has worked for 45 weeks in a single calendar year is classified as a permanent employee with greater benefits and job security than other employees, is part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

### STATUTORY PROVISION INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), provides in pertinent part:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, \* \* \* provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin \* \* \*.

### INTEREST OF THE UNITED STATES

Congress has placed primary responsibility for enforcement of Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission and the Attorney General. Recent decisions of this Court have held that practices which would otherwise be unlawful under Title VII are not unlawful if they are the result of bona fide seniority systems protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), but the Court has not yet offered guidance as to the range of employment practices encompassed in a "seniority system" as used in that provision. In this case the court of appeals held that a collective bargaining agreement provision requiring employees to work 45 weeks in any one calendar year in order to acquire enhanced status and rights was not part of a "seniority system" within the meaning of Section 703(h), and this Court's resolution of that issue may have a significant impact on the scope of the protections of Title VII.

### STATEMENT

#### 1. The Complaint

In 1973 respondent Bryant, a black male, filed a complaint<sup>1</sup> in the United States District Court for the Northern District of California on behalf of himself and other similarly situated blacks against the

<sup>1</sup> Respondent filed an amended complaint in 1974 (A. 9-24). References in this brief to the "complaint" refer to the amended complaint.

California Brewers Association and seven brewing companies (petitioners here), and several unions. The complaint alleged that the defendants had discriminated against Bryant and other blacks with respect to their employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and in violation of 42 U.S.C. 1981.<sup>2</sup>

In particular, the complaint alleged that Bryant had been "employed as a temporary brewer for [petitioner Falstaff Brewing Corporation] off and on for the last five (5) years beginning May 1, 1968" (A. 17). It charged that "[i]n past years, going back as far as their inception, the defendant employers have discriminated against blacks both in hiring and employment" (*id.* at 16).<sup>3</sup> The complaint further alleged that "[t]he vehicles for the perpetuation of this invidious discrimination are the seniority and referral provisions of the collective bargaining agreement, which were negotiated [by all the defendants]

<sup>2</sup> According to the complaint, Bryant, before filing the action, had filed a timely charge with the Equal Employment Opportunity Commission and had received a right to sue letter from the Commission on July 23, 1973 (A. 19-20). Bryant also alleged that he had exhausted the grievance procedures under the collective bargaining agreement (*id.* at 20).

<sup>3</sup> In support of this claim, the complaint alleged, *inter alia*, "[i]n the brewery industry in the San Francisco Bay area there is only one (1) Black person employed in production and he is not a permanent employee" (A. 16), and that when Bryant was hired by Falstaff "there were no Black workers in the plant \* \* \*. Since that time four (4) or five (5) Black employees were hired but none were granted permanent status and all have since left Falstaff" (A. 17).

a number of years ago" (*ibid.*). The complaint referred specifically to Sections 4 and 5 of the agreement (A. 16, 27-41), which define several classes of employees and their respective rights with respect to hiring and layoffs (see pages 5-9, *infra*), and alleged that those provisions "have operated to prevent plaintiff and the members of his class from achieving the rights and benefits accorded permanent employees \* \* \*" (A. 16-17).

Although the complaint focused on the provisions of the bargaining agreement that allegedly perpetuated the effects of petitioners' discriminatory practices, it also alleged that on one occasion one of the respondent unions referred white workers with rights under the agreement inferior to Bryant's, rather than Bryant, to vacancies at a plant of petitioner Theodore Hamm Company; and that these referrals constituted racial discrimination and a violation of Bryant's rights under the agreement (A. 18).

## 2. The Challenged Provisions of the Collective Bargaining Agreement

The collective bargaining agreement referred to in the complaint is a multi-employer agreement negotiated more than 20 years ago by the California Brewers Association (on behalf of the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board (on behalf of the respondent unions) (Pet. App. 3 & n.1). Sections 4 and 5 of the Agreement (A. 27-41) establish five classes of employees and the respective rights of each



class with respect to hiring and layoffs. Three of the classes are pertinent here: "permanent," "temporary" and "new" employees.<sup>4</sup>

The agreement defines a permanent employee as "any employee \* \* \* who \* \* \* has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in [the State of California]" (Section 4(a)(1); A. 27). An employee who gains permanent status retains that status unless he "is not employed under this Agreement for any consecutive period of two (2) years \* \* \*" (Section 4(a)(5); A. 29).<sup>5</sup>

The agreement defines a temporary employee as "any person other than a permanent employee \* \* \* who worked under this agreement \* \* \* in the preceding calendar year for at least sixty (60) working days \* \* \*" (Section 4(a)(2); A. 28). The agreement defines a new employee as any employee who is not a permanent or temporary employee (Section 4(a)(4); A. 28-29).

The rights of employees with respect to hiring and layoffs depend in large part on their status as permanent, temporary or new employees. With respect to layoffs, the agreement requires each employer

<sup>4</sup> The agreement also establishes classes of "temporary bottlers" and "apprentices," whose status and rights are governed by special provisions not pertinent here.

<sup>5</sup> An employee may also lose his permanent status if he "quits the industry or \* \* \* is discharged in accordance with the provisions of Section 3 hereof \* \* \*" (*ibid.*).

to maintain a "seniority list". The top portion of the list consists of all permanent employees, ranked in descending order of their seniority at the establishment (*i.e.*, in order of "plant seniority"); the next portion consists of all temporary employees, also ranked in descending order of their plant seniority; and the last portion consists of all new employees, similarly ranked (Section 4(c); A. 30-31)). The agreement requires that employees lowest on the list must be laid off first (*ibid.*).

The agreement also gives permanent employees special "bumping" rights. Under Section 4(b), if a permanent employee has been laid off from any plant subject to the agreement, he may be dispatched by the union hiring hall to any other plant in the same local area, and he has the right to replace the temporary or new employee at the second plant with the lowest plant seniority (A. 30).

Finally, the agreement provides that each employer shall obtain employees through the local union hiring hall to fill needed vacancies, and it provides that the hiring hall must dispatch laid-off workers to such an employer in the following order: first, permanent employees of that employer in order of their seniority with that employer; second, other permanent employees registered in the area in order of their seniority in the industry in California; third, temporary employees in the order of their seniority in the industry in California; and fourth, new employees in the order of their seniority in the industry in California (Section 5(c); A. 37-38).



Because there has been no trial in this case, the actual effect of these provisions has not been precisely determined. The complaint generally alleged that they had the effect of perpetuating the effects of discrimination (A. 16). Moreover, it appears that demand for labor has declined in the California brewing industry since these provisions went into effect, with the result that for a number of years few, if any, temporary employees have been able to work for enough weeks in any calendar year to acquire permanent status (see Pet. App. 3).

It is apparent from the terms of Sections 4 and 5 of the agreement that the acquisition of permanent status, and the enhanced rights that go with it, do not depend on the cumulative length of an employee's service with the employers who are parties to the agreement. For example, if Employee A worked 46 weeks in 1960 (and thereby acquired permanent status) and two weeks every year thereafter, he would continue to be a permanent employee and have superior rights to Employee B who started work in the industry in 1965 and worked 44 weeks in that year and every succeeding year.<sup>6</sup> Employee B would also have inferior rights to Employee C who started

<sup>6</sup> As noted *supra*, page 6 & note 5, an employee loses his permanent status if he "is not employed under this agreement for any consecutive period of two (2) years," or if he "quits the industry or \* \* \* is discharged in accordance with the provisions of Section 3 hereof \* \* \*" (Section 4(a)(5); A. 29). The record does not indicate what conduct on the part of a permanent employee would be deemed to constitute "quit[ting] the industry."

work in 1976 and was able to work 46 weeks in that year.<sup>7</sup> Moreover, the permanent status acquired by A and C in this example, and the bumping, layoff and rehiring rights flowing from that status, further diminish the chances of B and other temporary employees from ever working long enough in any one calendar year to acquire permanent status; these provisions thus tend to "lock" classes of employees into their status.

### 3. The Decisions Below

The district court granted the defendants' motions to dismiss the complaint for failure to state a claim on which relief could be granted (A. 43-45). The court issued no opinion; its judgment was apparently

<sup>7</sup> In this latter example, if both Employee B and Employee C attempted to work as much as possible in 1976, both would have a substantially equal chance to gain permanent status in that year, assuming proper and non-discriminatory application of the agreement. (B's substantial length of service in the industry would be a slight factor in his favor; for example, he should be dispatched to vacancies first (Section 5(c); A. 37-38), and if B and C began work in the same plant on the same day in 1976 and a layoff decision came down to a choice between the two of them, C should be laid off first. See Section 4(c)(5)(2); A. 31.) But a large number of fortuities could result in only C's acquiring permanent status in 1976 despite B's far greater length of service under the agreement. Thus B might have found work with a plant that had to lay him off after 40 weeks because of a decline in orders while C found work with a plant whose business was thriving. Or B might be "bumped" by a permanent employee who had been laid off by another plant in B's local area. Or B might have been incapacitated for two months that year, or might have gone to another state for several months to seek more stable employment.

based on the defendants' contention that the challenged portions of the collective bargaining agreement constituted a "bona fide seniority system" within the meaning of Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and thereby were outside the prohibitions of Title VII even if they perpetuate the effects of past discrimination (see Pet. App. 5).

The court of appeals reversed (Pet. App. 1-13). It held that the provision of Section 4(a)(1) of the agreement, requiring an employee to work 45 weeks in one calendar year in the industry to acquire permanent status, was not part of a "seniority system" at all within the meaning of Section 703(h), because that provision "lacks the fundamental component of such a system \* \* \* [which is] the concept that employment rights should increase as the length of an employee's service increases" (*id.* at 8-9). The court pointed out (*id.* at 9-10) that in contrast to a traditional seniority system,

the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year.

The court concluded that (*id.* at 12) "while the collective bargaining agreement does contain a seniority

system, the 45-week provision is not a part of it." The court explained (*id.* at 12 n.11):

The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.<sup>181</sup>

Accordingly, the court of appeals remanded the case to the district court to enable Bryant to prove his claim that the 45-week provision had a discriminatory impact on black workers under the principles of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) (Pet. App. 13).<sup>9</sup>

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<sup>181</sup> The court also observed (Pet. App. 11) that "the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." This aspect of the system, is in contrast to true seniority systems, in which rights "usually accumulate automatically over time \* \* \*" (*ibid.*).

<sup>9</sup> The court also directed the district court on remand to permit Bryant to prove his allegation that provisions of the collective bargaining agreement had been discriminatorily applied and his claims of unfair representation by the unions in violation of 29 U.S.C. 159(a) and 185(a) (Pet. App. 12-13).



## INTRODUCTION AND SUMMARY OF ARGUMENT

The general principles governing the rights protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are fairly well settled by this Court's decisions. In broad terms, Title VII makes it unlawful for employers, after the effective date of the Act, to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin \* \* \*." 42 U.S.C. 2000e-2(a)(1). A rule or practice of an employer that is neutral on its face may be unlawful under the Act if it has a substantially disparate impact on any protected group or if it perpetuates the effects of the employer's prior discrimination. If an employee or applicant for employment demonstrates that a rule or practice has such a disparate impact or perpetuates the effects of prior discrimination, he establishes a *prima facie* case that such rule or practice is unlawful under the Act. An employer may rebut a *prima facie* case by showing that the rule or practice is justified by business necessity (*e.g.*, that a required qualification is job related and there is no satisfactory alternative having less disparate impact), but the employer may not defend on the ground that it had no intent to discriminate. See, *e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 328-331 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 334-343 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

One limited statutory exception to the prohibition against rules or practices that have disparate impacts or that perpetuate the effects of pre-Act discrimination concerns "bona fide seniority systems." Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides in pertinent part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority \* \* \* system, \* \* \* provided that such differences are not the result of an intention to discriminate because of race [*etc.*] \* \* \*." In *International Brotherhood of Teamsters v. United States*, *supra* (hereinafter "*Teamsters*"), this Court held that under Section 703(h), a bona fide seniority system is not unlawful even if it perpetuates the effects of pre-Act discrimination. The Court, however, recognized, as the statute provides, that a seniority system is not "bona fide" if it was established for the purpose of discriminating against a protected group<sup>10</sup> and that Section 703(h) does not

<sup>10</sup> In our view, a seniority system would also not be "bona fide" if it were contrary to other laws, such as the National Labor Relations Act. This case does not present the question whether the challenged provisions of the agreement, assuming them to constitute a "seniority system," are "bona fide." The complaint does not allege that these provisions were instituted for a discriminatory purpose, or that they violated the National Labor Relations Act, which would ordinarily be a claim that would have to be presented to the National Labor Relations Board in the first instance. The complaint did allege the related but distinct claim that the respondent unions violated their duty of fair representation under the



immunize the manipulation or application of a seniority system in an intentionally discriminatory manner. 431 U.S. at 353, 356.

In *Teamsters*, the Court considered a seniority system under which the acquisition of certain rights (vacations, pensions and other fringe benefits) depended on the employee's cumulative length of service with the company and the acquisition of other rights (preferences in bidding for job vacancies and protections from layoffs) depended on the employee's cumulative length of service in his bargaining unit within the company. Although the Court recognized that there are a great variety of seniority systems and that seniority may be "measured in a number of ways" (431 U.S. at 355 n.41), it did not attempt to define the statutory meaning of "seniority system" or to identify the essential elements of such a system.

This case involves provisions governing the rights of employees that are significantly different from those involved in *Teamsters*, and the question presented for this Court's review is whether the court of appeals correctly concluded that the 45-week rule in petitioner's collective bargaining agreement is not a seniority system within the meaning of Section 703(h).<sup>11</sup> With respect to that question, the statute,

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Act (cf. *Vaca v. Sipes*, 386 U.S. 171 (1976)), and the court of appeals correctly remanded that claim for consideration by the district court. See also note 11, *infra*.

<sup>11</sup> The complaint and the decision below also raise other questions not presented for this Court's review. Although the complaint focuses on the 45-week rule of the agreement, it

its legislative history, and the cases provide limited guidance. The statute does not define "seniority system" and the legislative history does not indicate the precise scope of the term. The decisions of this Court also have not construed the meaning of the term in the context of Section 703(h) and only three other court of appeals decisions have considered whether a particular system or rule constitutes a seniority system under that section, with somewhat divergent results<sup>12</sup> (see pages 20-21, *infra*). The general term "seniority system" has been discussed in cases and scholarly literature in a number of other statutory contexts, such as the Military Selective Service Act and the National Labor Relations Act, but in those other contexts a precise definition of "seniority

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also includes several allegations that state a claim whether or not the 45-week rule is part of a seniority system within the meaning of the statute. Thus, it alleges that some of the defendants discriminated against Bryant by failing to dispatch him to job vacancies in the order required by the agreement, in violation of Title VII, 42 U.S.C. 1981, and 29 U.S.C. 159(a) and 185(a) (A. 18). It also alleges that the defendant unions violated 29 U.S.C. 159(a) and 185(a) by failing fairly to represent Bryant and similarly situated employees in negotiating the agreement (A. 19). It was error for the district court to dismiss these claims on the pleadings. The court of appeals correctly directed the district court to consider those claims on remand and petitioners have not sought this Court's review of that aspect of the decision below.

<sup>12</sup> *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1388-1389 (5th Cir.), on rehearing, 583 F.2d 132, 133 (1978); *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978), pending rehearing en banc (Nos. 78-1083, 78-1084); *Alexander v. Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978).

system" often has not been necessary because legal rights have not depended on it. In any event, those discussions, though helpful in some cases (see pages 28-35, *infra*), are not dispositive of the proper construction of the term in the context of Title VII and its own particular purposes.

In our view the court of appeals correctly concluded that the 45-week rule did not constitute a seniority system within the meaning of Section 703(h). As discussed more fully below, our submission rests on three principles that we believe are important in determining whether particular rules or practices constitute "seniority systems" within the meaning of Section 703(h).

First, the fact that a rule may be ancillary or related to a system of employee rights and privileges that has true seniority features does not make that rule itself qualify as a "seniority system" entitled to the immunity of Section 703(h). We believe that under the statute, courts are required to analyze the nature of the particular rule or rules that are challenged and may not conclude that they are protected simply because they may be related to a system with true seniority features.

Second, we submit that the court of appeals correctly identified the essential elements of a seniority system as a system in which rights accrue primarily on the basis of cumulative length of service in the relevant unit and in which the accrual of those rights is fairly automatic and does not depend significantly on fortuities unrelated to cumulative length of serv-

ice. How employers and employee bargaining agents may incorporate these elements in particular agreements is permissibly subject to considerable variation, but the court below correctly concluded that the challenged provisions in this case lack these essential elements of a seniority system.

Third, the foregoing conclusions are supported by the general principle that exceptions from the provisions of a remedial statute should be narrowly construed. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, No. 77-952 (Feb. 27, 1979), slip op. 25; *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Thus, however loosely the term seniority system may be used by courts and commentators in other contexts, the broad remedial purposes of Title VII (see, e.g., *United Steelworkers v. Weber*, No. 78-432 (June 27, 1979), slip op. 6-8) support the court of appeals' construction of the term in this context.

## ARGUMENT

### I. THE FACT THAT RULES OR PRACTICES MAY BE RELATED TO A SYSTEM WITH TRUE SENIORITY FEATURES IS NOT A SUFFICIENT BASIS FOR CONCLUDING THAT THOSE RULES OR PRACTICES CONSTITUTE A "SENIORITY SYSTEM" ENTITLED TO THE IMMUNITY OF SECTION 703(h)

Petitioners, the respondent unions and amici supporting them argue that there are a wide variety of what are commonly understood to be seniority systems in the United States, and that although "seniority"



itself is a measure of time worked, most "seniority systems" have a large number of ancillary rules or requirements for the acquisition or retention of rights which are not related to time worked. For example, there may be threshold requirements for entering the seniority ladder (*e.g.*, probationary periods, or experience in a particular job or unit), or conditions on which seniority may be lost (*e.g.*, discharge or prolonged absence). All such ancillary rules, it is argued, are integral parts of "seniority systems" and are entitled to the immunity of Section 703(h). They further argue that to hold otherwise would significantly reduce the negotiating flexibility of employers and collective bargaining agents. (See Pet. Br. 25-39; Union Br. 21-50; AFL-CIO Br. 6-20; Equal Employment Advisory Council Br., *passim*.)<sup>13</sup>

This argument, which is central to petitioners' position, is in our view incorrect. Suppose, for example, a provision of a collective bargaining agreement (which might be entitled and referred to by the parties as "Seniority System") provided that protections against layoffs and priorities for job bidding depended on the amount of time the employee worked in the unit *and* his score on a vocabulary test (or some weighted average of the two). Or suppose it provided that an employee had to achieve a certain

<sup>13</sup> The brief of amicus Equal Employment Advisory Council is perhaps most explicit on this point: it contends (page 10) that "in order to determine whether the provision is in fact part of a seniority system, the courts should look only for a nexus between the provision in question and the operation of the system as a whole."

score on the test before he could begin to accumulate the seniority that would give him those protections and priorities. In these examples, the test score requirement is clearly related to the entire system of acquiring rights and privileges, and could even be described as integral to it, but we submit that it would be incorrect to regard the test score requirement as the kind of "seniority system" that Congress intended to immunize from the prohibitions of Title VII.<sup>14</sup> Indeed, if a rule or requirement were entitled to immunity under Section 703(h) merely because it is related to a system of acquiring rights containing true seniority features, the high school diploma and test score requirements considered in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), would have been entitled to immunity because they were conditions for being hired or transferred, and thus for inclusion in the company's various seniority ladders.

In sum, it is not sufficient for a challenged rule or practice simply to be related to or part of a system

<sup>14</sup> It would be incorrect to regard such a requirement as entitled to immunity unless "seniority system" were so broadly defined as to include any rules governing the acquisition of superior employment rights and privileges regardless of their relationship to time served. As the court of appeals correctly observed (Pet. App. 12, n.11), under petitioners' position "any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." Such a broad definition is plainly at odds with the common understanding of the "seniority system" and with Congress' intent in Section 703(h).



with seniority features to come within the exception of Section 703(h). In our view the court of appeals correctly concluded that the statute required it to analyze the system of rules more carefully and to determine whether the particular rule that is challenged itself contains the essential elements of the seniority principle.

The Fourth and Fifth Circuits have reached the same conclusion in decisions dealing with the scope of the term "seniority system" under Section 703(h). *Patterson v. American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978) (pending rehearing en banc (Nos. 78-1083, 78-1084)); *Parson v. Kaiser Aluminum & Chemical Corp.*, 583 F.2d 132 (5th Cir. 1978). Although the rules challenged in those cases are somewhat different from the 45-week rule in this case, the courts correctly held that they were not immunized by Section 703(h) merely because of their relationship to a system containing seniority features. Thus, *Patterson* involved, *inter alia*, an informal requirement that employees in one department (with one seniority ladder) could not transfer to a higher level department (with a separate seniority ladder) unless they were familiar with the duties of the new job in the opinion of their supervisor. In holding that this requirement was not a seniority system, the court stated (586 F.2d at 303): "Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system." *Parson* also dealt with a requirement for inter-department transfer—that the transferee work at a

lower paying job for at least 10 days. The court held (583 F.2d at 133; emphasis in original): "While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by § 703(h) and *Teamsters*." <sup>15</sup>

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<sup>15</sup> Petitioners and the respondent unions rely (Pet. Br. 33-34; Union Br. 38-39) on the Sixth Circuit's decision in *Alexander v. Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (1977). Although that decision seems to suggest a somewhat different view, its holding is not contrary to our position. That case involved a rule under which bidding preferences for particular jobs were based on the relative plant-wide seniority of those employees who had had experience with that job. In holding that the rule was immune under Section 703(h), the court rejected the argument that these "job equity" features were "not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of [']a bona fide seniority . . . system.'" 565 F.2d at 1378. While this statement would suggest support for petitioners' position, the court's holding was that the rule was simply a way of designating the group or unit of employees within which seniority accrues—*e.g.* a type of "limited occupational seniority" (565 F.2d at 1378) not different in substance from the departmental seniority considered in *Teamsters*. See note 19, *infra*. Whether or not the Sixth Circuit was correct on those facts, the rules challenged in the present case and in *Patterson* and *Parson*, in contrast, are not simply rules designating groups within which seniority accrues on occupational or departmental lines, but are rules giving different seniority rights to employees within the same department, unit or occupation on the basis of requirements which, as we discuss in point II, *infra*, do not embody the seniority principle.

Petitioners and those supporting them are incorrect in arguing that the court of appeals' approach would deprive employers and unions of appropriate flexibility in negotiating collective bargaining agreements tailored to their particular needs and circumstances. Any conclusion that a rule is not a seniority system entitled to the immunity of Section 703(h) does not mean that such a rule is unlawful under Title VII. The complainant must still demonstrate that the rule has had a disparate impact on a protected group or has perpetuated the effects of pre-Act discrimination. And even if the complainant demonstrates those effects, it is open to the defendant to show that the rule is justified by business necessity.<sup>16</sup> Indeed, employers and unions typically negotiate many rules and practices that have nothing to do with seniority. In short, the only effect the court of appeals' approach might have on employers and unions would be to deter them from negotiating and maintaining provisions that have no significant business justification and that they have reason to believe would have a disparate impact on protected groups or would perpetuate the effects of pre-Act discrimination. That kind of collective bargaining "flexibility," we submit, is not what Section 703(h) was designed to protect.

<sup>16</sup> In this case, respondent Bryant has not yet had an opportunity to prove his allegation that the 45-week rule has had prohibited effects and at a trial it would be open to petitioners and respondent unions to demonstrate a business necessity for the rule. As yet, however, petitioners and respondent unions have not alleged even a business interest served by the rule.

## II. THE CHALLENGED 45-WEEK RULE IS NOT A SENIORITY SYSTEM UNDER SECTION 703(h) BECAUSE THE ACCRUAL OF RIGHTS DOES NOT DEPEND PRIMARILY ON CUMULATIVE LENGTH OF SERVICE

1. In our view, as we have stated in point I, *supra*, the dispositive question in this case is not whether the challenged 45-week rule is related to or part of a system with true seniority features, but whether the challenged rule itself contains the essential elements of the seniority principle. With respect to this question there appears to be no disagreement among the parties and the court of appeals on certain matters. First, no one disputes that certain provisions of the collective bargaining agreement in this case contain the essential elements of the seniority principle. These include the rules providing that the rights of employees within each class (*i.e.*, with respect to other employees in the class) depend on relative lengths of service within various specified units. Thus, a temporary employee who has worked 30 weeks in a plant must be laid off before another employee in the plant who has worked 31 weeks. The disagreement among the parties centers on whether the requirement for passing from the temporary to the permanent class contains the essential elements of seniority.

Second, no one disputes that the basic concept of seniority is, at a minimum, some measure of time worked in a specified unit—*i.e.*, it is not a measure of educational achievement, job performance, family relationships with existing employees, or any other



criteria on which superiority of employee rights and privileges could be based but that are unrelated to time worked. Thus, petitioners state—(Br. 26): “*Seniority* is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job.” The dispute in this case concerns the *appropriate* measure of time worked.

In one sense, of course, the 45-week rule is a measure of time worked: a temporary employee must work 45 weeks in any one calendar year in order to become a permanent employee; and petitioners appear to argue that the rule therefore embodies the principle of seniority (Br. 20-22).<sup>17</sup> We disagree, however, with the proposition that a rule governing the acquisition of rights is a “seniority” rule merely because it is based on some measure of time served. Suppose, for example, that a rule provided that in order to become a permanent employee one must work seven days in any one week—a rule that might well

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<sup>17</sup> Petitioners’ position on this point is not entirely clear. While they argue (Br. 20) that a temporary employee’s “chances for becoming a Permanent employee are enhanced over time \* \* \*,” they also state (*id.* at 21) that “the acquisition of Permanent status is not independent of total time worked, except in the most technical sense.” Respondent unions also seem to contend that the 45-week rule, in contrast to other classification devices, embodies the seniority principle; thus they state (without further discussion) that “[t]he forty-five week rule is based on industry service as defined in the rule itself” (Br. 40). Both petitioners and union respondents, however, rely primarily on the argument that the rule is entitled to Section 703(h) immunity because it is an integral part of the entire seniority system (see discussion, *supra*, pages 17-22).

prevent an orthodox sabbatarian from ever acquiring permanent status despite many years of faithful and virtually continuous service to his employer. Although such a rule is based, in a sense, on a measure of time served, we think that few would regard it as a “seniority” rule or system. While the rule in this example may be improbable, it is analytically no different from the rule in this case. By requiring that the time served be within a given period of time, the vice in both instances is that no credit is given for the employee’s previous or cumulative service. The seniority system considered by this Court in *Teamsters* and other cases,<sup>18</sup> in contrast, had no such feature, but instead provided for the accrual of rights on the basis of cumulative service in the specified units.

In our view, a seniority system, as it is used in Section 703(h) and as it is commonly understood, is one in which the accrual of rights depends primarily on the cumulative length of service in the specified unit.<sup>19</sup> If we are correct, it cannot be seriously dis-

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<sup>18</sup> *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

<sup>19</sup> Whether the rules specifying the units within which seniority is accrued are themselves immune from scrutiny under Title VII is a question this Court need not decide in this case. Because there can be no meaningful seniority system in the absence of some specification of the unit within which rights are accrued, it could be argued that such speci-



puted that the 45-week rule in this case is not a seniority system. A temporary employee's total length of service in prior years is of no significant benefit to his acquisition of permanent status. He may have worked 44 weeks in the industry for each of the past 20 years; yet at the beginning of each year his chances of becoming a permanent employee are not significantly greater than a new employee's. Moreover, his employment rights may always be inferior to those of some permanent employee with far

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fication is an indispensable part of every seniority system, and equally entitled to immunity under Section 703(h). Cf. *Teamsters*, *supra*. On the other hand, if the specification of the units within which seniority accrues is itself based on a criterion that has a disparate impact, it seems to us questionable whether that specification would be similarly entitled to immunity. Suppose, for example, that an agreement provides that the seniority of all company employees is based on length of service with their particular plant, except that the seniority of sons of employees is based on their company-wide seniority. Cf. *Teamsters*, *supra*, 431 U.S. at 349 & n.32. Although the Court in *Teamsters* held that Section 703(h) applied to a system in which seniority was based on length of service within particular bargaining units, the Court stated (431 U.S. at 356): "The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents." Whether other ways of specifying the units within which seniority accrues would be similarly protected seems to us an open question. In this case, however, we do not understand respondent Bryant as having challenged the provision of the agreement specifying the units within which seniority accrues for different purposes.

less total service in the industry. See pages 8-9, *supra*.<sup>20</sup>

As we have noted (pages 14-15, *supra*), whether or not we are correct that a seniority system requires recognition of an employee's cumulative length of service is a question on which Title VII, its legislative history and the cases provide limited guidance. Title VII does not define "seniority system." Moreover, although the legislative history cited by the union respondents and this Court in *Teamsters*<sup>21</sup> indicates (as the Court held) that Congress desired to protect "seniority" rights of existing employees, none of it clearly indicates what Congress meant by "seniority" rights or "seniority system."

Nevertheless, to the extent the legislative history sheds light on the issue in this case, it supports our position. Thus it is significant that the only example

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<sup>20</sup> We do not contend that a seniority system must in every case provide for an incremental increase in rights with each additional day worked (which might be the case with a simple last-hired-first-fired rule). A seniority system may provide for the acquisition of rights in stages, defined by minimum periods of service in the specified unit (*e.g.*, an increase in vacation or other benefits after a certain number of years of service in the unit), so long as the acquisition of those rights is based primarily on cumulative length of service in the unit. In this case, for example, if the agreement provided that an employee becomes a permanent employee after 45 weeks of cumulative service in the industry (whether or not within one calendar year), it would in our view qualify as a seniority system under Section 703(h).

<sup>21</sup> Union Br. 26-32; *Teamsters*, *supra*, 431 U.S. at 350-352. See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758-763 (1976).

of a seniority system discussed in that history is one in which rights ordinarily accrue on the basis of cumulative length of service—*i.e.*, the normal rule that the last employee hired is the first fired. See 110 Cong. Rec. 7207, 7213, 7217 (1964). In addition, a statement of the Department of Justice, considered and relied on during the debates on Title VII (110 Cong. Rec. 7207 (1964)),<sup>22</sup> also seems to reflect the view that seniority rights are those that are based on cumulative length of service, not merely on completion of a certain period of service within a specified span of time. Thus, the Department stated (*ibid.*; emphasis supplied): “If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of [Title VII]. \* \* \* But, in the ordinary case, assuming that seniority rights were *built up over a period of time* during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII.”

Furthermore, although this Court has not considered the precise scope of the term “seniority system” in cases dealing with Section 703(h) of Title VII, our position finds considerable support in this Court’s decisions dealing with a similar question under Section 9 of the Military Selective Service Act, now codified at 38 U.S.C. 2021, and its predecessors.

<sup>22</sup> Cited in full in *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 760 n.16.

That statute provides that any person who has left a permanent position with any employer to enter the military and who reapplies for employment within 90 days of his discharge must “be restored to such position or to a position of like seniority, status, and pay \* \* \*.” In determining whether a particular right or benefit is a right or benefit of “seniority” to which returning veterans are entitled under Section 9, this Court has developed a twofold test. Under that test, a right or benefit is a perquisite of “seniority,” first, if it would have accrued with reasonable certainty had the veteran remained in the job instead of serving in the military, and second, if it is in the nature of “reward for longevity with an employer.” *Alabama Power Co. v. Davis*, 431 U.S. 581, 589 (1977). Both of these considerations, as they have been explained and applied by the Court, support our position that the 45-week rule is not a seniority system.

With respect to the reasonable certainty test, the Court has explained that a right or benefit is not a perquisite of seniority if it depends primarily on factors, such as the employer’s discretion, unrelated to length of service with the employer. Thus, in *McKinney v. Missouri-K.-T. R.R.*, 357 U.S. 265 (1958), a returning veteran claimed a right to a promotion that he contended he would have obtained if he had continued with the employer. The Court, however, concluded that the promotion was not a perquisite of seniority because it depended “not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part



of the employer.” *Id.* at 272. See also *Tilton v. Missouri Pacific R.R.*, 376 U.S. 169 (1964). Similarly, the 45-week rule in this case and related provisions in the agreement provide no reasonable certainty that the benefit (permanent status) will accrue fairly automatically with increased length of service; instead it depends mainly on the discretion of the employer (in deciding when and how many employees to lay off each year) or other fortuities (*e.g.*, seasonal fluctuations in business or bumping by permanent employees).<sup>23</sup>

It is true, as the Court recognized in *Tilton v. Missouri Pacific R.R.*, *supra*, 376 U.S. at 180-181, that the acquisition of true seniority rights inevitably depends on some fortuities—*e.g.*, that the employee is not discharged for cause, or does not die, quit or become incapacitated. Nevertheless, *Tilton* and *McKinney v. Missouri-K.T. R.R.*, *supra*, reflect the proposition that the essence of a seniority system is one that provides reasonable certainty to employees

<sup>23</sup> As the court of appeals correctly observed, the 45-week rule is particularly susceptible to manipulation by employers and unions in order to exclude disfavored employees (Pet. App. 11). Of course, if it can be shown that an employer or union intentionally manipulated manpower needs and the timing of layoffs in order to prevent certain protected groups from ever acquiring permanent status, a plaintiff would establish a violation of Title VII even if the 45-week rule were a seniority system within the meaning of Section 703(h). But even in the absence of such proof, we believe that the fact that a system makes the acquisition of rights so largely dependent on events within the control of the employer or some other person supports the conclusion that it is not a seniority system.

that the acquisition of certain rights will depend primarily on the length of time they are willing to provide satisfactory service (barring incapacitating events beyond anyone’s control) rather than on events within the control of the employer or other persons. The 45-week rule in this case provides no such certainty.

The second indicator of seniority rights identified by this Court—whether they are rewards for longevity of service—is perhaps even more pertinent here. For example, in *Alabama Power Co. v. Davis*, *supra*, the Court concluded that pension benefits, which accrued on the basis of length of service, were perquisites of seniority because they were in the nature of “rewards [for] longevity with an employer” rather than compensation for service actually rendered. 431 U.S. at 593. The Court found support for its conclusion in the fact that pensions serve purposes that are distinct from the purpose of ordinary compensation for services actually rendered. The Court stated (431 U.S. at 594):

A pension plan assures employees that by devoting a large portion of their working years to a single employer, they will achieve some financial security in their years of retirement. By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force.

Although the focus and purpose of the inquiry under the Military Selective Service Act are some-



what different from the inquiry under Section 703(h), the same considerations are pertinent in both contexts.<sup>24</sup> Seniority rights are in their nature rewards for "longevity with an employer" and they serve certain characteristic interests, such as providing enhanced job or financial security for older employees, and promoting stability in the work force. Those considerations support our contention that the 45-week rule is not a seniority system. It does not reward an employee for his longevity with his employer or (as this agreement specifies) with the multi-employer bargaining unit. It only rewards an

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<sup>24</sup> Under the second prong of the test under Section 9, the focus of the inquiry is on the nature of the right or benefit provided, and not upon the formula by which the right is computed (see *Alabama Power Co. v. Davis*, *supra*, 431 U.S. at 592), while the inquiry under Section 703(h) is whether the method by which the rights are acquired is a seniority system. But the same considerations are relevant to both inquiries. If the method by which rights are acquired does not reward longevity with the employer or promote the kinds of interests that are characteristic of seniority rights, the system should not be regarded as a seniority system even though the particular rights involved are those that are usually provided as a reward for longevity with an employer.

In view of the differences between the inquiries in each context, however, it is conceivable that a particular right might be deemed a perquisite of seniority under Section 9 even though the method by which that right is acquired might not be deemed a seniority system under Section 703(h). This possibility may result not only from the somewhat different nature of the inquiries but also from the fact that the term seniority should be liberally construed under Section 9 (see *Alabama Power Co. v. Davis*, *supra*, 431 U.S. at 584-585) but should be narrowly construed under Section 703(h) (see page 38, *infra*).

employee for completing a certain period of service within a specified span of time and for avoiding a number of fortuities that might have prevented him from doing so. For this reason an employee entering the industry cannot reasonably expect that his job security will increase so long as he is willing to provide satisfactory service. Furthermore, the rule would seem to inhibit rather than promote stability in the work force, because it provides little inducement for temporary employees with substantial cumulative experience with the multi-employer unit to return to the work force each year. Indeed, it seems to us significant that petitioners and respondent unions have not even suggested any legitimate business interest served by this rule.

2. Petitioners, the respondent unions and amici supporting them rely<sup>25</sup> on two early cases under the Military Selective Service Act for the proposition that seniority provisions in many collective bargaining agreements frequently do not make the acquisition of rights turn solely on the employee's cumulative length of service. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). If anything, however, those cases support our contention that the concept of seniority as used and understood by Congress relates to cumulative length of service. In *Aeronautical Industrial District Lodge*,

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<sup>25</sup> Pet. Br. 28-32, 37-38; Union Br. 21, 24-27; AFL-CIO Br. 6-7, 10-15.

a returning veteran objected to the implementation of a provision in a bargaining agreement, adopted during his military absence, that gave greater layoff protection to employees who were union chairmen than to other employees (including the veteran) with greater cumulative length of service. The Court held that the implementation of this provision was *not* in conflict with the veteran's rights under the statute; in other words, that the veteran's statutory rights to the perquisites of "seniority" did not entitle him to rights granted by the bargaining agreement on the basis of criteria (like union office) other than cumulative length of service. This holding is quite consistent with *McKinney v. Missouri-K.-T. R.R.*, *supra*, and other cases discussed at pages 29-31, *supra*.

The language in the opinion relied on by petitioners (see 337 U.S. at 526-527; Pet. Br. 28-29) is simply to the effect that collective bargaining agreements may, consistently with the statute, grant rights and preferred status (loosely referred to as "seniority rights") on the basis of many criteria other than cumulative length of service. What the Court held, however, was that such rights are not "seniority" rights within the meaning and intent of the statute. Certainly that case does not suggest, as petitioners seem to contend, that a seniority right as used in the Military Selective Service Act or Title VII includes all rights provided by a collective bargaining agreement to different employees, or that a seniority system as used in the statute includes any provision that the agreement calls a "seniority system."

*Ford Motor Co. v. Huffman*, *supra*, is to the same effect. There, a provision of an agreement (also negotiated in the returning veteran's absence) gave employees credit, for layoff purposes, for the period of their pre-employment military service. A returning veteran, who had no such pre-employment military service, objected that the provision gave superior status to employees with less length of service with the employer than his own, allegedly in conflict with his rights under the Act. The Court again rejected the claim. As in *Aeronautical Industrial District Lodge*, the challenged provision granted rights on a basis other than cumulative length of service with the employer, and those rights were therefore not "seniority" rights to which the returning veteran was entitled.

3. We have argued that a seniority system within the meaning of Section 703(h) is one in which the acquisition of rights depends primarily on an employee's cumulative length of service within the specified unit, and that the 45-week rule in this cases does not satisfy that principle. We do not contend, however, that that principle must be applied in any particular manner. Its application by employers and bargaining agents to particular agreements and circumstances is permissibly subject to considerable variation. For example, they may designate different units within which seniority is to be accrued for different purposes (see note 19, *supra*), and they may condition the acquisition of various rights on any length of service they deem appropriate, so long as the system for acquiring those rights gives primary recognition to cumulative length of service.



Furthermore, we do not contend that a seniority system within the meaning of Section 703(h) may not give reasonable recognition to continuity of satisfactory service. If particular rules provided, for example, that an employee loses accumulated seniority if he is discharged for cause, or if he has not worked in the unit for five consecutive years, such rules would, in our view, be consistent with the basic principle of a seniority system. See, *e.g.*, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 & n.6 (1977). Under such rules, the accumulation and retention of seniority in most cases continues to be largely within the employee's control, and such rules provide existing employees with reasonable assurance that their rights will not be diminished by the unexpected return of long absent former employees. Therefore they enhance, rather than diminish, the certainty with which increased rights and benefits accrue and promote the stability of the work force. On the other hand, if particular rules provided, for example, that an employee loses all accumulated seniority if he fails for any reason to work for seven work days in any one calendar year, or if he is cited by his supervisor for some minor infraction of plant rules, such rules would not in our view constitute a rational means of rewarding continuity of satisfactory service and would not be consistent with the principle of seniority.

Distinguishing between rules that are consistent with that principle and those that are not neces-

sarily requires some line drawing,<sup>26</sup> but the rule challenged in this case does not, we submit, come close to the line. The 45-week rule, in effect, prevents an employee from gaining permanent status if, for any reason, he is unemployed in the industry for more than seven weeks in any one calendar year, and it is immaterial whether that period of unemployment is a continuous period. That rule plainly does not serve any purpose of rewarding continuous satisfactory employment, and neither petitioners nor the respondent unions have contended that it does. In short, it cannot be justified as a seniority system on that ground.<sup>27</sup>

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<sup>26</sup> The same sort of line drawing is required to some extent in determining the similar question whether a right or benefit is a perquisite of "seniority" within the meaning of Section 9 of the Military Selective Service Act, discussed *supra*, pages 28-33.

<sup>27</sup> It may also be the case that a seniority system within the meaning of Section 703(h) can recognize other interests, in addition to cumulative length of service and continuity of service, but this case does not require this Court to identify exhaustively the interests that may properly be served. For example, it might be consistent with the principle of seniority for a system to establish separate seniority ladders for part time and full time employees, or for seasonal and year-round employees. The status of such systems under Section 703(h) need not be decided in this case because the 45-week rule is clearly not such a system. Under the rule, a temporary employee may work the same hours in the same job and in the same department as a permanent employee, and in any given year he may work substantially more weeks than a permanent employee and yet remain in an inferior status. Furthermore, 45 weeks per year cannot be justified as a reasonable definition of purely seasonal unemployment, and petitioners have not attempted to do so.



### III. THE TERM "SENIORITY SYSTEM" IN SECTION 703(h) SHOULD BE NARROWLY CONSTRUED IN VIEW OF THE BROAD REMEDIAL PURPOSES OF TITLE VII

Because Title VII and its legislative history do not define or clearly indicate the scope of the term "seniority system," the question in this case is not entirely free from doubt. To the extent there is a reasonable doubt, however, courts in this context should be guided by the principle that exceptions from a remedial statute should be narrowly construed. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, No. 77-952 (Feb. 27, 1979), slip op. 25; *Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 12 (1976); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The broad remedial purposes of Title VII have frequently been recognized; as the Court said in *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 429-430, Congress' purpose "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Section 703(h) provides a limited exception for "bona fide seniority \* \* \* system[s]" by which employers and unions are legally permitted to perpetuate the effects of their past racial discrimination. In this and other cases, that exception should be narrowly construed.<sup>28</sup>

<sup>28</sup> Petitioners have raised an additional issue that we have not addressed (Pet. Br. 3): "Whether the Court of Appeals erred by summarily deciding the seniority issue before de-

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1979

velopment of a factual record concerning the operation and purposes of the brewery industry system." They argue (Br. 42-46) that the district court correctly ruled that the challenged provisions of their agreement constitute a seniority system as a matter of law, but that any conclusion that it does not could only be based on facts that have not yet been established. We disagree that any remand is necessary on this issue. The provisions of the agreement speak for themselves; there appears to be no dispute as to their meaning; and whether they constitute a seniority system under Section 703(h) is solely a question of law.

No. 78-1548

Supreme Court, U.S.  
FILED

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IN THE

**Supreme Court of the United States**

**October Term, 1978**

**CALIFORNIA BREWERS ASSOCIATION, et al.,**

*Petitioners,*

**v.**

**ABRAM BRYANT, et al.,**

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit**

**BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE**

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## TABLE OF CONTENTS

	<i>Page</i>
Introduction and Summary of Argument .....	2
Argument .....	5
I. The Court Below Has Given an Impermissibly Narrow Construction to the Term "Seniority Sys- tem" in § 703(h) of the Civil Rights Act of 1964	5
II. Even on the Restrictive Construction of § 703(h) Adopted Below the System Here Was Entitled to § 703(h) Protection; In Holding Otherwise, the Court Below Misunderstood the System .....	28
III. The Proper Disposition of This Case .....	35
Conclusion .....	36
Appendix	

## TABLE OF AUTHORITIES

### Cases:

<i>Alexander v. Aero Lodge No. 1735</i> , 565 F.2d 1364 (C.A. 6) .....	27
<i>Aeronautical Lodge v. Campbell</i> , 337 U.S. 521 .....	3, 7, 10, 12, 13, 20, 23
<i>Crocker v. Boeing Co. (Vetrol Div.)</i> , 437 F.Supp. 1138 (E.D. Pa. 1977) .....	27
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 ..	10, 12, 19, 20
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 .....	5, 6, 14, 25, 34
<i>Humphrey v. Moore</i> , 375 U.S. 335 .....	19
<i>Labor Board v. News Syndicate Co.</i> , 365 U.S. 695, affirming 279 F.2d 323 (C.A. 2) .....	29, 30



	<i>Page</i>
<i>Parson v. Kaiser Aluminum Corp.</i> , 575 F.2d 1374 (C.A. 5), amplified on denial of rehearing, 583 F.2d 132, cert. denied 47 L.W. 3761 .....	25, 26
<i>Patterson v. American Tobacco Co.</i> , 586 F.2d 300 (C.A. 4) .....	25
<i>Pettway v. American Cast Iron Pipe Co.</i> , 576 F.2d 1157 (C.A. 5), cert. denied 47 L.W. 3482 .....	25
<i>Teamsters v. United States</i> , 431 U.S. 324 .....	2, 3, 6, 8, 18, 24, 25
<i>Trans World Airlines v. Hardison</i> , 432 U.S. 63 ...	2, 35
<i>United States v. Maher</i> , 307 U.S. 148 .....	7

#### Statutes:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. 2000e et seq. Section 703(h), 42 U.S.C. 2000e-2(h) .....	passim
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Aaron, Reflections on the Legal Nature and Enforce- ability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962) .....	7, 8, 11, 22
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U.S. Dept. of Labor, Bulletin No. 1425-11, Seniority in Promotion and Transfer Provisions (1970) .....	21, 23, 25
U.S. Dept. of Labor, Bulletin No. 1425-14, Administration of Seniority (1972) .....	16
U.S. Supreme Court Briefs and Records, Nos. 75-636 and 75-671 .....	19

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v.

ABRAM BRYANT, *et al.*,  
*Respondent,*

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**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit**

---

**BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE**

---

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 104 national and international labor unions, having a total membership of approximately 13,750,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Teamsters v. United States*, 431 U.S. 324, 352, this Court held that "the unmistakable purpose of § 703(h) [of the Civil Rights Act of 1964] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." And, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82, the Court quoted *Teamsters'* statement of the purpose of § 703(h) with approval and continued:

Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976). Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.

In the present case a divided Court of Appeals held that § 703(h)'s protection is not applicable to section 4(a)(1) of the collective agreement, which provides that in order to become a "permanent employee", and thereby enjoy advantages over all other employees, one must have "completed forty-five weeks of employment under this Agreement \* \* \* in one calendar year as an employee of the brewing industry in this State \* \* \*". (A. 27) According to the majority of the court below:

No comprehensive definition of "seniority system" is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the fundamental component of such a system. Accordingly,

we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination. [585 F.2d at 426.]

In that court's view the 45-week requirement was disqualified from protection under § 703(h) because "the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service" (*id.*); thus, according to the lower court, because rights under the agreement do not "accrue automatically in the absence of resignation, termination, or transfer" (*id.* at 427) they are not seniority rights. We submit that the court below: 1) gave too narrow a reading to the statutory term "seniority system"; and 2) so misunderstood the agreement in question that it failed to recognize that the agreement satisfied the lower court's own constricted definition of "seniority system".

In Part I we show that the Court of Appeals misconstrued the term "seniority system" in § 703(h). That court did not consider the legislative history of that provision which shows its purpose, and which "contains no suggestion that any one [seniority] system was preferred." (*Teamsters, supra*, 431 U.S. at 355, n. 41.) And the lower court failed to examine "the conventional uses of the seniority system in the process of collective bargaining" which should govern construction of "seniority systems" in § 703(h) as it did of the term "seniority" in veterans' preference legislation. (*Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526.) Industrial practice shows that seniority systems are systems which base employment preferences on length of service, but are not limited to those systems which define seniority in accord with the employees' cumulative length of



service with the employer. Contrary to the Court of Appeals' approach the definitions of "seniority" in collective bargaining agreements "are almost too varied to enumerate." (Slichter, Healey and Livernash *The Impact of Collective Bargaining on Management* (1960), 116.) The essential constituent elements of a "seniority system" are "the criteria to be used in selecting the employees" (the seniority measure) and "the unit to be chosen" (the identification of the employees eligible to compete). The system "involves the interaction" of these elements. (*Id.* at 157). Each element takes many forms and the combinations created from them are myriad. Industrial practice shows specifically that there are countless agreements under which the employees' relative competitive seniority is not strictly a function of total length of employment within the unit of seniority, be it industry, plant, department, etc.; and that the court below was mistaken in stating that "seniority rights under a true seniority system usually accumulate automatically over time," (585 F.2d at 427). Thus, that court excluded from the statutory term "seniority system" a vast number of agreements which are entitled to the protection of § 703(h).

In Part II, we show that even if the Ninth Circuit's construction of § 703(h) were correct, it erred in holding that the system here did not satisfy the standards it declared. Although the Court of Appeals accepted the validity of the agreement's classification of employees as "permanent" and "temporary," the court believed the rule governing acquisition of "permanent" status—performance of 45 weeks' work within a calendar year—did not depend upon cumulative length of service. It did not examine the provisions of the agreement governing priorities for assignment among temporary employees, and simply assumed, incor-

rectly, that temporary employees are assigned arbitrarily. On the basis of that error, the court below mistakenly believed that length of service did not determine which temporary employee manages to secure 45 weeks' work in a single calendar year. In fact, priorities for assignment among temporary employees, and thus opportunities to secure 45 weeks' work in a single calendar year, are strictly a function of accumulated service.

In Part III we state briefly what we believe is the proper disposition of this case. Although the Court of Appeals erred in its construction of § 703(h), the district court erred in dismissing the complaint. For plaintiff alleged therein that the seniority system was improperly motivated; if that is so, the seniority system is excluded from protection by the proviso to § 703(h). Plaintiff is entitled to a remand to enable him to establish discriminatory motive.

### ARGUMENT

#### 1. *The Court Below Has Given an Impermissibly Narrow Construction to the Term "Seniority System" in § 703(h) of the Civil Rights Act of 1964.*

A. Although § 703(h) "is directed toward defining what is and what is not an illegal discriminatory practice" (*Franks v. Bowman Transportation Co.*, 424 U.S. 747, 761; see *Hardison, supra*, 432 U.S. at 82, quoted at p. 2, *supra*), Congress did not further define the provision's key operative term "seniority system." The legislative history shows that "[t]hroughout the initial consideration of H.R. 7152, later enacted as the Civil Rights Act of 1964, critics of the bill charged that it would destroy existing seniority rights," that protection of those seniority rights was a matter of great and general concern, and that § 703(h) was added to the bill in order to make double sure the assurances given

by the sponsors of Title VII that its enactment would not have an adverse affect on existing seniority rights. (See *Teamsters*, 431 U.S. at 350-352; *Franks*, 424 U.S. at 759-761.) Moreover, the *Teamsters* Court, in concluding that "[t]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems," recognized:

Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws; A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1602 (1969). The legislative history contains no suggestion that any one system was preferred. [431 U.S. at 355, n. 41.]

To be sure, this conclusion does not resolve entirely the meaning of the term "seniority system", which was used in the opinion as in the statute. But it does provide a lesson of great importance for our immediate purposes. The *Teamsters*' footnote emphasized the significance of existing industrial practice in determining the scope of § 703(h). It is at least implicit in that statement, and is certainly necessary to accomplish the avowed objective of § 703(h), that this provision encompasses all *bona fide* agreements which create employee seniority rights. In this respect, *Teamsters* employed the methodology spelled out by the Court when it was confronted with the identical problem of construction of the term "seniority" in veterans' preference legislation:

In providing that a veteran shall be restored to the position he had before he entered the military service

"without loss of seniority," § 8 of the Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran. [*Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526.]

As Mr. Justice Frankfurter stated in another context, "The recognized practices of an industry give life to the dead words of a statute dealing with it". (*United States v. Maher*, 307 U.S. 148, 155.)

B. The Court of Appeals did not find its definition of "seniority system" in the statutory language as such and that court did not refer to the legislative history. (In the latter respect, we think that court erred for it gave no weight whatsoever to the clearly expressed purpose of § 703(h). (See pp. 5-6, *supra*.) Rather, the court below derived the meaning of the statutory phrase entirely from a single sentence in an article: "Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement". (Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962), quoted at 585 F.2d at 426.) The Court of Appeals drew therefrom the rigid notion that "service" must mean all service with the employer, and that seniority rights must "accrue automatically". Given the nature of the statutory issue herein, that court appropriately looked to a recognized student of labor relations; indeed, this Court in *Teamsters* cited the same article,

and another, in describing the nature of seniority systems. (See 431 U.S. at 355, n. 41, quoted at p. 6, *supra*.) But the Court of Appeals misunderstood what Professor Aaron wrote and thus gave to the term "seniority" a meaning far more restrictive than that term has in the real world of collective bargaining and in the statute.

In the paragraph immediately following that from which the Court of Appeals quoted, Professor Aaron wrote:

Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. For the purposes of this discussion it is unnecessary to review the different types, which range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity. [Aaron, *supra*, 75 Harv. L. Rev. at 1534. (This appears to be the passage referred to by the citation in *Teamsters, supra*.)]

The leading treatise on collective bargaining practices states:

Up to this point the word seniority has been defined arbitrarily as an employee's length of continuous service with the company. This broad definition is reasonably accurate insofar as eligibility for benefit programs is concerned. It serves well in the application of benefit seniority. However, the definition may be entirely inadequate and misleading for those items involving the use of competitive status seniority to determine order of layoff, recall, promotion, and other preferential treatment. For these areas the definitions are almost too varied to enumerate.

A distinction should be made between the "unit" of seniority or its scope of application, and the measurement of, or ranking by, seniority. The need for this distinction will be recognized in Chapter 6 "Layoff and

Work-Sharing Arrangements" and in Chapter 7 on the subject of "Promotions." For example, the phrase "departmental seniority" could have one or both of two meanings. It might mean that the least senior worker in a particular department will be the first laid off, yet ranking in the department might be based on total service with the company. In this sense, the term "departmental seniority" refers to the unit for purposes of applying seniority. Or the term may refer to the measurement of seniority; that is, the employees within the department will have their relative status determined by their length of service in the department. It could mean both if the measurement is based on the unit of application.

The scope of the seniority unit and the measurement of service vary according to the use to which the seniority criterion is being put. In the case of benefit seniority it is usually length of continuous service with the company. But where competitive job rights are at stake, there may well be one scope-measurement amalgam for temporary layoffs, another for permanent layoffs, another for promotions, and still others for different preferential treatments to be accorded senior employees. To illustrate, a broad unit is likely to apply in the case of layoffs, thus enhancing the chance of a senior man to be retained during a period of work curtailment. In the case of promotion a narrow unit is more likely to govern. [Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960) 116-17<sup>1</sup>]

<sup>1</sup> Sumner Slichter, Lamont University Professor at Harvard University (and, *inter alia*, President of the American Economic Association) was the most distinguished labor relations scholar of his day. *The Impact of Collective Bargaining on Management* represents the culmination of his life-long study of the collective bargaining system. This treatise devotes 107 pages to the discussion of variations in seniority systems. (*Id.* 104-210.)



This Court has recognized the variety of seniority systems both in terms of the measure used and the unit of employees entitled to compete on the basis of that measure. In *Aeronautical Lodge, supra*, the Court said:

Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53, n. 21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determinations; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, *Trends in Collective Bargaining*, 100-102 (1945); Harbison, *Seniority Policies and Procedures as Developed through Collective Bargaining* 1-10 (1941). [337 U.S. at 526-527.]

Again, in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-339, the Court said:

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of

employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See, e.g., *Hartley v. Brotherhood of Clerks*, 283 Mich. 201, 277 N.W. 885; and see also, Williamson & Harris, *Trends in Collective Bargaining* (1945), 100-103.

While there is great variety, there is also a measure of consistency. As Professor Aaron states, "seniority is a system of employment preference based on length of service" (Aaron, *supra*, 75 Harv. L. Rev. at 534). It is true that systems of employment preference *not* so based are *not* recognized as "seniority systems". Thus, to extent the Court of Appeals excluded "an academic degree requirement" and "merit promotion" it was correct. (585 F.2d at 427, n. 11.) But, as Professor Slichter and his colleagues add, to equate competitive status seniority with "the employees' length of continuous service with the company," is "entirely inadequate and misleading". For the "definitions are almost too varied to enumerate." (Slichter, *et al., supra*, 116.) Thus, those careful students of the field would go no further than to state that competitive status seniority systems include both a "'unit' of seniority or its scope of application" and a "measurement of, or ranking by seniority" (*id.*); viz., both a rule (or rules) defining the class of employees en-

titled to compete and a rule (or rules) defining "service" that will be taken into account in resolving that competition.

These are the essential constituent elements of a "seniority system." Such a system "involves the interaction" of "the criteria to be used in selecting the employees" (the seniority measure) and "the unit to be chosen" (the identification of the employees eligible to compete). (*Id.* at 157). Each of these elements takes many forms and the combinations created from them are myriad. That is why seniority systems are as varied as American industry and are flexible enough to meet its varied needs.

C. We turn now to the particular characteristics which the court below determined are necessary to the existence of a "seniority system" within § 703(h): the "increase in employee rights or benefits [must be] based upon the length of the employee's accumulated service" (585 F.2d at 426); and those rights must "normally accrue automatically in the absence of resignation, termination or transfer" (*id.* at 427). We show that these court-imposed requirements do not correspond with "the conventional uses of the seniority system in the process of collective bargaining." (*Aeronautical Lodge, supra*, 337 U.S. at 526.)

One need not look further than the decisions of this Court to recognize that this is so. In *Ford Motor Co. v. Huffman*, *supra*, this Court held that a union did not breach its duty of fair representation by awarding veterans of World War II artificial seniority credit for their period of military service, notwithstanding that that military service predated the employees' initial date of hire with the Company. The Court recognized that the effect of this provision was that employees with greater *actual* service were "in some in-

stances \* \* \* now surpassed *in seniority* by employees who entered the employ of Ford after they did but who are credited with certain military service which they rendered before their employment by Ford." (345 U.S. at 335 (emphasis added).) But, the Court concluded, nothing in the National Labor Relations Act

compel[s] a bargaining representative *to limit seniority clauses solely to the relative lengths of employment of the respective employees.* [*Id.* at 342 (emphasis added).]

In this regard, the Court cited a 1949 compilation of collective bargaining agreements by the Department of Labor which "quotes many seniority clauses as examples of those then in use and including many factors other than length of employment." (*Id.* at 341 n. 11.<sup>2</sup>)

In *Aeronautical Lodge, supra*, the Court dealt with a collective bargaining agreement which declared that "Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen." (337 U.S. at 523.) The suit involved a challenge by returning veterans that this provision, first negotiated while they were away in military service, violated the command of the selective Service Act that returning veterans be "restored without loss of seniority," for it resulted in their layoff while employees previously junior to them were retained. The court of appeals had invalidated the provision, concluding

<sup>2</sup> The Court also cited certain principles evolved by a committee appointed by the Department of Labor, among them the principle that newly hired veterans "should be allowed *seniority credit*, at least for purposes of job retention, equal to time spent in the armed services plus time spent in recuperation from service-connected injuries or disabilities either through hospitalization or vocational training." (*Id.* at 341 (emphasis added).)

that "the Act forbade disregard of length of service, so far as veterans are concerned." (*Id.* at 525.) This Court reversed, declaring:

*To draw from the Selective Service Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which the Act refers is a part. One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end provision is made, as it was made here, against laying them off merely on the basis of temporal seniority. Because they are union chairmen they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights. [*Id.* at 527 (emphasis added).]*

In *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 747, this Court approved the conferral of "rightful place" seniority upon those who would have obtained jobs earlier but for the employer's timely-challenged post-Act discrimination, describing this remedy as "seniority relief."<sup>3</sup> Further this Court recognized the right of parties in collective bargaining to award artificial seniority to victims of past discrimination even where not required to

<sup>3</sup> In his partial dissent, Justice Powell described the effect of this remedy:

[T]he discrimination victim is placed ahead of others not because of time actually spent on the job but 'as if' he had

do so by Title VII (*e.g.* if the discrimination occurred prior to the effective date of the Act, or was post-Act but not timely challenged), in order to place them in their "rightful place":

The Court has \* \* \* held that a collective-bargaining agreement may go further, enhancing *the seniority status* of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify *the seniority system* to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority', is certainly no less than in other areas of public policy interests. [*Id.* at 779 emphasis added).]

This Court thus has repeatedly recognized that a "seniority system", as that term is commonly used in labor relations, may depart from strict length of service by providing artificial enhancements to some employees, beyond their accumulated length of service, for certain purposes.<sup>4</sup> And while no case before this Court has involved the other side of that coin—limitations upon the accumulation of seniority—such limitations are also a frequent phenomenon in labor relations.

A Department of Labor study of agreements covering 8.2

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worked since he was denied employment. This also requires an assumption that nothing would have interrupted his employment, and that his performance would have justified a progression up the seniority ladder. [*Id.* at 793.]

<sup>4</sup> For other instances of enhanced seniority beyond length of service see U.S. Dept. of Labor, Bulletin No. 908-11 (1949), 10.



million workers (U.S. Dept. of Labor, Bulletin 1425-14, *Administration of Seniority* (1972), 1) discloses that 90% of the collective bargaining agreements containing "seniority systems" provide that an employee will lose (or "break") his seniority in specified circumstances. (*Id.* at 25.) "The most frequently encountered condition for loss of seniority, cited in nearly three-quarters of the agreements mentioning seniority was expiration of recall rights following a layoff. Depending on the agreement, the period before seniority was lost ranged from less than a year to 10 years." (*Id.* at 26.) Most agreements provide that employees rehired following a loss of seniority "must start as new employees \* \* \* and receive no credit for seniority acquired in their previous employment." (*Id.* at 30.) Thus, it is not uncommon for one employee to have less "seniority" than another even though he has devoted a greater number of years of service to the employer; if his service was broken in the middle by an extended layoff, he started anew when rehired.

This same phenomenon results from any other contractually specified ground for breaking service. Among the most common ones identified in the DOL study were these:

*"Failure to report back from layoff"*: Where an employee is recalled from work *before* his service has broken, but fails to report within a specified time, "almost 70 percent of the seniority provisions" declared that service would break. (*Id.* at 26-27.)

*"Leave of Absence"*: Nearly 40% of the agreements provided that an employee who failed to return promptly at the conclusion of an approved leave of absence would break service. (*Id.* at 27.)

*"Medical leave"*: 17% of the agreements provided that service would break after "prolonged absence for medical reasons." (*Id.* at 28.)

*"Violations of the terms of a leave of absence"*: "[M]ore than a quarter of the seniority provisions . . . stipulated that an employee violating the terms of his leave of absence would lose his seniority." (*Id.* at 28.) Most of these made it such a violation for the employee to work elsewhere during his leave of absence. (*Id.*)

*"Unreported or unexcused absence"*: More than one-third of the seniority provisions "provided for loss of seniority for unexcused or unreported absence" — usually specifying 3 to 10 days as the period of absence triggering the service break. (*Id.*)

*"Transfer out of the bargaining unit"*: "[I]t is common for persons transferring out of the bargaining unit—most often to supervisory jobs—to lose their seniority." (*Id.* at 29.)

In each of these instances (and in others specified in some agreements) employees' relative competitive seniority is not strictly a function of total length of employment. Yet no one would suggest that such provisions—found in 90% of all seniority agreements—render the systems containing them not "seniority systems". In this regard, it is significant that these provisions are described in a DOL study entitled "Administration of Seniority", and that the chapter describing them begins by describing them as features of "seniority systems." (*Id.* at 25).

Apart from factors which "break" service altogether, "collective bargaining agreements may specify conditions in which regular employees are subject to reduction in se-

niority ranking.” (*Id.* at 21.) It is “relatively common,” for example, that an employee who foregoes an opportunity to take a job to which his seniority would entitle him forfeits relative competitive standing to the junior employee who takes that job, or forfeits the right to obtain a similar job for a specified time period, or, more rarely, suffers a permanent reduction in his status on the seniority list. (*Id.*) These phenomena, which the Department of Labor described under the heading “Modification of Seniority” (*id.*), have never been understood to render the system not a “seniority system”.

The Court of Appeals cited nothing to support its statement that “seniority rights under a true seniority system usually accumulate automatically over time \* \* \*.” (585 F.2d at 427.) That court’s view is erroneous. The records of two cases in this Court show that the parties to the seniority arrangements there at issue recognized that accumulation of seniority is so far from automatic that they expressly provided a procedure for resolution of disputes on this subject. In *Teamsters* itself Article 5 of the Agreement, which dealt with seniority, contained a section 7 which provided:

The parties acknowledge that the above rules are intended solely as general standards and further that many factual situations are presented to Committees which necessitate modification or amendment. Accordingly, the Employers and Unions acknowledge that questions of *accrual*, interpretation or application of seniority rights may arise which are not covered by the general rules set forth. Accordingly, it is understood that the Employers and Unions jointly involved, and/or the respective grievance committees may mu-

tually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances. The Change of Operations Committee provided in the National Master Freight Agreement or the Supplemental Agreements shall have the authority to determine the establishment and application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committees, including the Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding. [R. Nos. 75-636 and 75-671, Vol. III, pp. 812-813 (emphasis added).]

And the seniority agreement in *Humphrey v. Moore*, 375 U.S. 335 provided:

In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. [*Id.* at 338. See also *id.* at 337-338, 345-347.]

In sum, when the court below declared absolute accumulation of length of service to be “[t]he fundamental component of a seniority system” (585 F.2d at 426), it was inventing a standard wholly foreign to the world of collective bargaining. A reliance upon length of service is, indeed, the quality which distinguishes seniority systems from other systems of employee selection, but as this Court has twice recognized, collective bargaining has never made *absolute* accumulation of length of service the funda-

mental component of such systems. (*Ford Motor Co. supra*, 345 U.S. at 342; *Aeronautical Lodge, supra*, 337 U.S. at 527.)

The court below, by confining the term "seniority system" in § 703(h) to pure cumulative length of service, thus ignored "the conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge, supra*, 337 U.S. at 526), and disregarded "the widespread acceptance and relevance" (*Ford Motor Co., supra* 345 U.S. at 343) of seniority systems which use a different measure of service. That court thereby departed from the standard which governs construction of § 703(h) (see point A, *supra*). In place of that standard, the court below substituted its own notions of industrial justice. While that is in any event an impermissible approach to construing § 703(h), it is instructive to observe how wide of the mark the notions of the court below are, when compared to those which in fact inform "the process of collective bargaining."

D. The court below confined § 703(h) to those systems which adhere absolutely to cumulative service, because it believed that the lone value of seniority systems is rewarding long and faithful service to the employer. In fact, that equity is but one of a number of values—reflecting the diverse interests of the parties at the collective bargaining table—which are involved in, and ultimately compromised in, the parties' agreement on a particular seniority system.

Seniority systems have resulted principally from union insistence.<sup>5</sup> It is generally agreed that three considerations led to the evolving, and now virtually universal, union desire for adoption of seniority systems: (1) they remove

<sup>5</sup> *Aeronautical Lodge, supra*, 337 U.S. at 526; Cooper & Sobol,

job assignments from management discretion, thereby eliminating factors such as personal favoritism, nepotism, prejudice, and other subjective considerations which employees considered unfair determinants of selection; (2) they replace that management discretion with an objective criterion which eliminates disputes between employees as to relative entitlement and enables employees to predict their present and future employment prospects vis-a-vis other employees; and (3) by virtue of their objectivity, they provide unions an automatic basis for determining which employee's claim to a job should be supported, and thus eliminate the weakening of union cohesiveness which would ensue were the union called upon in each instance to pick and choose among its members' competing claims to a job under less automatic criteria.<sup>6</sup>

These interests in objectivity and predictably might have been served by the adoption of criteria for selection other than seniority, e.g. age, alphabetical order, or drawings in a lottery. That seniority was the universally-chosen criterion reflects, of course, that length of service has been deemed the most equitable of the possible objective criteria.<sup>7</sup> But even the choice of length of service, from among the possible objective criteria, has reflected a complex of employee interests and not simply rewarding long service.

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*Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604 (1969); U.S. Dept. of Labor, Bulletin 1425-11, *supra*, 1.

<sup>6</sup> Slichter et al., *supra*, 104-105; Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-05; Stacy, *Title VII Seniority Remedies in A Time of Economic Downturn*, 28 Vand. L. Rev. 487, 488-489 (1975).

<sup>7</sup> Slichter et al., *supra*, 104.



If that had been the sole employee interest, unions invariably would have sought the broadest possible seniority measure: industry service, or at least company or plant service. That unions often have championed narrower seniority systems (e.g. departmental, unit, line of progression, or job) is the result of weighing competing employee interests—e.g., the desire of incumbents to be free of the risk of displacement by senior employees coming from other parts of the plant, and the desire for greater predictability which flows from employees in a unit knowing that more senior employees elsewhere in the plant cannot jump ahead of them in promotional situations. These interests are distinct from, indeed in some instances antithetical to, the equity of rewarding long service. A union which champions a departmental seniority system is not responding to the view that one day's work in a department is more equitably "deserving" of reward than ten years' service elsewhere in the plant; rather, it is responding to the reality that the matrix of *all* employee interests has made the proffered system the most desirable compromise. As Professor Slichter and his colleagues recognized, (Slichter *et al.*, *supra*, 140), the formulation of the rules themselves requires the compromise of a great variety of competitive interests among union members."<sup>8</sup>

Of equal importance, seniority systems are not decreed by unions and employees alone. A union's assessment of the seniority system which best accommodates the conflicting interests of the employees it represents enables it to formulate the proposal it will bring to the bargaining table,

<sup>8</sup> See also Aaron, *supra*, 75 Harv. L. Rev. at 1535.

but it does not determine what system will emerge from the collective bargaining process. For the employer, too, has a vital stake in the shape of the seniority system. As explained in U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions—Seniority* (1949), 14:

"Management customarily prefers narrower seniority units, preferably by job classification or department, in order to establish competition between the same skills, to prevent excessive displacement of workers and numerous transfers from one department to another, and to eliminate high training costs. The types of seniority incorporated in agreements probably reflect attempts to reconcile the view that the wider unit gives the greatest protection with the belief that some kind of limitation on departmental, occupational, or geographic lines is necessary for productive efficiency."<sup>9</sup>

Thus, "the conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge*, 337 U.S. at 526) have not been confined, as the court below thought, solely to rewarding long and faithful service. They have, rather, accommodated that value with others deemed important by employees, and, ultimately, with others deemed important by management.

There is nothing in the legislative history to suggest that Congress, in adopting § 703(h), meant to protect only those seniority systems which reward long service to the total exclusion of the other values which such systems customarily serve. Indeed, had Congress' focus been that limited,

<sup>9</sup> See also, Slichter *et al.*, *supra*, 167, 192-193; U.S. Dept. of Labor, Bulletin 1425-11, *Seniority in Promotion and Transfer Provisions* (1970), 11.

it would not have extended protection to narrower seniority systems which compromise the reward of long service in order to effectuate other employee and management interests. Rather, as this Court found in *Teamsters*, the concern which actuated Congress was that employees' expectations arising out of their existing seniority systems, *whatever their terms*, not be disturbed by the enactment of Title VII so long as those systems were not discriminatorily motivated. (431 U.S. at 352-354, 355 n. 41.) This may have reflected a positive preference on Congress' part to insulate innocent employees from this particular consequence of past employer discrimination (*id.* at 352-353); or it may have reflected a less value-laden fact of legislative life, the recognition by Title VII's sponsors that assurance of stability to America's workers was necessary to "clear[] the way for the passage of Title VII" (*id.* at 352). Which ever prompted the Congressional decision, the decision itself is clear: Congress insulated all innocently-motivated "seniority systems" as that term is understood in collective bargaining; Congress did not limit its protection to those systems built upon any particular set of underlying value schemes. There is, accordingly, no justification for construing § 703(h) not to protect the vast majority of seniority systems which, through the compromise of many divergent employee and management interests, depart from the pristine model demanded by the Ninth Circuit.<sup>10</sup>

**E.** We believe that it is incumbent on us to point out that

<sup>10</sup> In the discussion above, we have noted that management concerns affect the shape of the seniority system emerging from collective bargaining. Those management concerns also result, frequently, in the collective bargaining agreement affording the employer some

the interpretation of § 703(h) advanced here demonstrates not only that the court below erred in this case but also impeaches the analysis in *Parson v. Kaiser Aluminum Corp.*, 575 F.2d 1374 (C.A. 5), *amplified on denial of rehearing*, 583 F.2d 132, *cert. denied*, 47 L.W. 3761; *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-1200 (C.A. 5), *cert. denied*, 47 L.W. 3482; and *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303, 305-306 (C.A. 4).<sup>11</sup>

This case concerns one of the two basic elements of seniority systems—the *measure* of seniority. *Parson*, *Pettway*, and *Paterson* concerned the other basic element of such systems—the definition of the employees eligible to compete using the measure chosen. The latter decisions

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leeway to override seniority in making specific decisions. For example, agreements often provide that the "senior" employee (however defined) will be entitled to a promotional opportunity so long as he has the ability to perform the job to which he seeks promotion, but that the employer may deny promotion to the senior employee if it determines that such employee lacks the requisite ability. (*Slichter et al.*, *supra*, 198-99; U.S. Dept. of Labor, Bulletin 1425-11 (1970), 7-10.) This case does not present the question whether employer decisions which *override* seniority are themselves protected by § 703(h). It is our view that they are not, *viz.*, that a decision to *bypass* the employee whose seniority (however defined) gives him first claim to a job is a decision to be measured by Title VII's commands exclusive of § 703(h), and that a judicial determination that that decision was made upon grounds violative of those commands would entitle the employee to his "rightful place," *viz.*, to the job to which his seniority would have entitled him but for the employer's unlawful decision to override seniority. (*Frank v. Bowman Transportation Co.*, *supra.*)

<sup>11</sup> While we believe that each of these decisions wrongly construed the term "seniority system", we express no view as to whether the results reached might have been justified on other grounds in light of the particular facts. (See *Teamsters*, *supra*, 431 U.S. at 346, n. 28.)

held that § 703(h) protects only the measure of seniority, and not the determination of the employees eligible to compete. But as we have shown above (pp. 8-12), seniority systems are universally understood in the collective bargaining world to encompass both elements.

The untoward results which flow from the failure of these courts to accord § 703(h) its full scope are most easily demonstrated from a consideration of the facts in *Parson*. The parties there had decided that opportunities to promote within a department should be limited to those already working in that department. However, instead of using length of service within the department as the seniority measure, they used length of service in the plant. The Fifth Circuit ruled that § 703(h) protected the parties' choice of plant service as the seniority measure, but not their decision to confine promotional opportunities to those within a department. Thus, as the system did not allow all employees in the plant to compete on the basis of plant service for promotions within a department, it was not protected by § 703(h). (575 F.2d at 1380-81, 1387-89; 583 F.2d at 133.)

The incongruity of this ruling is apparent. Had the parties chosen departmental service as the seniority measure, the Fifth Circuit would have found the system protected by § 703(h), although it would equally have limited promotional opportunities to those within the department (for those outside the department would not have had such seniority). The system actually chosen was more beneficial to those outside the department, for while it equally required that they enter a new department only through a job not desired by those already in the department, once there

they could exercise plant seniority in bidding for future promotional opportunities. Yet the parties were punished—their system was denied § 703(h) protection—because they had elected to provide this greater benefit.

The ruling is more than incongruous, however; it constricts the meaning of "seniority system" in a manner unknown to the collective bargaining world. One of the traditional seniority patterns is "seniority applied by department but computed on the basis of total plant or company service." (U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Security* (1949), 15.) Indeed, in 1960, Professor Slichter and his colleagues observed, and applauded, the:

trend \* \* \* toward the use of a single seniority date, usually the date of hire in the company or the plant, regardless of the units of seniority application. Ranking *within any given unit* by date of original hire in the company is becoming more prevalent. [Slichter *et al.*, *supra*, 117 (emphasis added).]

By divorcing the measure of competition from the unit of competition, and extending § 703(h) protection only to the former, these courts have committed the "common error" of those unfamiliar with collective bargaining: the "failure to think in terms of the total system." (*Id.* at 154.) That error was avoided in the decisions of other lower courts which have correctly concluded that § 703(h) protects not only the measure of seniority, but also the definition of those eligible to compete. (*Alexander v. Aero Lodge No. 1735*, 565 F.2d 1364, 1378-79 (C.A. 6); *Crocker v. Boeing Co. (Vertol Div.)*, 437 F. Supp. 1138, 1186-88 (E.D. Pa. 1977).)



**II. Even on the Restrictive Construction of § 703(h) Adopted Below—the System Here Was Entitled to § 703(h) Protection; In Holding Otherwise, the Court Below Misunderstood the System.**

**A.** In the instant case, the court below found § 703(h) inapplicable because it did not believe the unit of measure under challenge—the requirement of 45 weeks' service in a calendar year—is a "seniority" unit of measure. In that court's view, only those systems which credit *all* service, and which therefore prefer the employee with the greatest *cumulative* length of service, constitute "seniority" systems. The present system falls short, the court below concluded, because the system would permit a cumulatively-junior employee to achieve "permanent" status (i.e. completion of 45 weeks in a *single* calendar year) ahead of a cumulatively-senior employee. The lower court's analysis is legally deficient; as just shown § 703(h) is not limited to total accumulation seniority systems. But even if § 703(h) were so limited, that court has erred in believing that the agreement here establishes a non-cumulative system. To put it gently, the court below did not understand the system it condemned.

**B.** The brewery industry is a seasonal industry: beer sales are highest from spring to fall, and taper off in the winter. As in every seasonal industry, this produces a duality with respect to employment opportunities: a certain number of employees are needed year-round; an additional number are needed only during the peak season.

A traditional response of unions in seasonal industries has been to create two seniority "tiers"—one for year-round ("permanent") employees, the other for peak-season

("temporary") employees—as a means for limiting the number of employees enjoying "permanent" status. (Slichter *et al.*, *supra*, 124). By holding the number of "permanent" employees to roughly the number of year-round vacancies, the union escapes the necessity either for "work sharing" during the off-season (which results in all permanent employees receiving less than a full week's wage) or inevitable layoffs of "permanent" employees during the off-season (rendering "permanent" status illusory). It is common, therefore, to find seniority systems in seasonal industries which make acquisition of permanent status extremely difficult. (*Id.*)

A practice closely parallel to that of petitioners here was followed in the mail rooms of New York city newspapers as disclosed by the record in *Labor Board v. News Syndicate Co.*, 365 U.S. 695, *affirming* 279 F.2d 323 (C.A. 2). Even as the brewery industry's output changes seasonally, so the size of newspapers, and thus the need for mailroom personnel, differs substantially within each week, being especially heavy on the two evenings (Friday and Saturday) on which the Sunday paper is distributed.

The hiring practices of the New York Daily News were described by this Court as follows:

The minimum mailing-room staff ("regular situation holders") are both union members and journeymen; they report for work each night and are not required to "shape." To fill in vacancies and to meet added needs, the foreman next turns to "regular substitutes," who are both journeymen and union members. Next in line of priority are those the Board insists are referred to as "outside card men," but who are at any rate both journeymen and union members regularly shaping up for other newspapers, but available for work on the

News. The lowest priority category consists of what the Board calls "nonunion shaper" (and the union, "non-journeymen casuals"); at any rate, these men have neither union membership nor journeymen status. Within the category, such men are ranked in seniority running from the date of first shaping up for the News. [365 U.S. at 701, n. 3]

Thus, there were employees with permanent status at the News and in the industry (journeymen) and those without (casual workers); those in the former category (which had its own sub-categories) had an absolute preference over those in the latter, and different seniority ("priority") lists were kept for each category. Like that of the brewery industry here, the system utilized both service with a particular employer and within the industry as measures of seniority. (See also 279 F.2d at 331.) The parallel is striking also in that there, as here, the change of status depended not on a casual employee's ranking on the seniority list of casual employees, but on the amount of work he had performed. The union and the employer agreed:

to put into the class of a "regular substitute" those extras who in the prior two years had earned 15 vacation credits, which was another way of describing those who had averaged about three days' work a week. [365 U.S. at 700-701.]

The charging party in *News Syndicate*, Randall, did not qualify under this standard, although at the time he was first on the list of casuals on the basis of the date that he first sought employment at the News. (See, *id.*, n. 3).

Similarly, in the shipping industry there are three separate classes of employees "A", "B" and "C"; "A" employees have automatic preference with regard to hire over

"B" employees, and "B" over "C". Within each class job opportunities are awarded on the basis of a priority defined in the agreement. But in order for a "C" seaman to advance to "B" status he must have worked for a specified amount of time (90 days) during each of 8 consecutive years; all accumulated employment credit toward "B" status is lost if, in any year, the seaman is employed for less than 90 days.<sup>12</sup>

Consistent with this pattern the agreement in this case is carefully structured so that additional employees achieve "permanent" status only as the need for additional year-round employees arises, *viz.*, when there is an increase in the size of the year-round workforce, or when existing permanent employees vacate their jobs( e.g., through retirement, quit, transfer to other jobs, or promotions to supervisory status). To accomplish this limitation on the number who will ascend to permanent status, the agreement sets the eligibility criterion for ascendancy to that status at a level too high to be achieved simply by working during the peak season. The eligibility criterion is 45-weeks in a calendar year, a period longer than the peak season, and thus one which will not automatically elevate seasonal workers to "permanent" status even if they return each year for peak-seasonal work. Only as work opportunities open up on a year-round basis is it possible for employees to meet the 45-week criterion and achieve permanent status.

<sup>12</sup> As an appendix hereto we set out excerpts from the "Shipping Rules" of the "New Standard Freightship/Passenger Agreement between Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO and contracted companies (June 16, 1978-June 15, 1981)," which codify the seniority system described in the text.

C. The court below concluded that the measure which determines who *becomes* a "permanent" employee is not a "seniority" measure because it is not geared to cumulative length of service. And it is here that the Court of Appeals' failure to understand the system betrayed it, for even on its own restrictive construction of § 703(h) the measure here is cumulative length of service.

The Court of Appeals' misunderstanding flowed from its failure to examine the provisions of the agreement regulating competition *among* temporary employees. That court apparently assumed that assignments of temporary employees were made arbitrarily—or at least not on the basis of seniority—so that it was pure happenstance (and not a function of cumulative service) that determined which temporary employee would be employed for 45 weeks in a calendar year and thereby obtain permanent status. In fact, the determination of which temporary employee works 45 weeks in a calendar year is strictly a function of cumulative length of service.

The agreement covers a number of separate plants in the brewery industry in California. Temporary employees accrue two measures of seniority: (1) industry service, which represents the employee's total accumulated length of service at all plants covered by the agreement, and (2) plant service, which represent the employee's total accumulated length of service at a particular plant.<sup>13</sup>

At each plant, work opportunities for temporary employees are awarded on the basis of plant seniority; thus, the temporary employee with the greatest accumulated

<sup>13</sup> As is true in most collective bargaining agreements (see pp. 15-17, *supra*), seniority "breaks" (i.e. is lost) by absence from work

length of plant service will always have the first opportunity to secure work not done by permanent employees, and will always be the first temporary employee at that plant able to secure 45 weeks' work in a year and thereby qualify for "permanent" status. If work is available at a plant which is not claimed by permanent employees, and there are no temporaries with plant service available for work at that plant, the union must dispatch the temporary employee awaiting assignment with the greatest *industry* service; that employee will upon arrival be the most "plant senior" temporary, and thus will have the first opportunity to secure work for 45 weeks in a calendar year. In sum, acquisition of "permanent" status (through 45 weeks' work in a calendar year) is determined strictly by seniority: plant seniority in the first instance, and industry seniority if no temporary has plant seniority.

Of course, because employment opportunities will vary from plant to plant, it is possible that an employee assigned to one plant will achieve permanent status ahead of a more industry-senior employee assigned to another plant. But this possibility results *not* (as the court below thought) because the determination is based upon some factor other than cumulative length of service, but rather because cumu-

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for an extended period. This agreement provides that a temporary employee loses his *industry* service (*viz.*, loses his status as a "temporary" employee) if he fails to work anywhere in the industry for a year. (A. 29). Thus, a temporary employee who elected not to seek employment anywhere in the industry for a year would break service. The agreement provides that a temporary employee loses his *plant* service if he declines an opportunity to be recalled to that plant after having been laid off and having secured employment at another plant (*viz.* if he elects to stay at the new plant rather than return to the old). (A. 32.)



lative length of *plant* (rather than industry) service is the first determinant of who secures opportunities to work.<sup>14</sup>

The court below recognized (585 F.2d at 426, n. 10), that § 703(h) protects plant seniority systems as fully as industry seniority systems. But it apparently overlooked the fact that plant seniority is the first determinant of the order in which temporary employees will achieve "permanent" status.<sup>15</sup> Thus, even if the court below were correct in its

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<sup>14</sup> Indeed, the agreement here accords length of service a *greater* role than is customary in American industry. If each of the breweries had been covered by a separate agreement, pure chance (and not seniority) would have determined which employees secured employment at which plants, and which, therefore, were fortunate enough to secure employment at the plant with the greatest work opportunities. Here, because industry service governs the assignment of employees to plants, the most industry-senior temporary employee awaiting assignment will always be referred first, thus obtaining a better chance to secure 45 weeks in a calendar year than the less industry-senior temporaries awaiting assignment.

<sup>15</sup> The court below thought the system here more susceptible of discriminatorily motivated "manipulation" than those which it defined as "seniority systems" (585 F.2d at 427.) In fact, the opposite is true. (See n. 14, *supra*.)

In any event, susceptibility to manipulation is irrelevant to determining whether a system is a "seniority system" within the meaning of § 703(h). If an employer or union engages in an act of "manipulation," that is an independent violation of Title VII which can be adjudicated, and remedied, independently of the status of the system under § 703(h). (*Franks, supra*, 424 U.S. at 758.) And if the employer and union construct a seniority system for the *purpose* of facilitating manipulation, the system will be a "seniority system" within the meaning of § 703(h) but will lack protected status thereunder by virtue of the proviso withholding that protection from discriminatorily motivated seniority systems. (*Hardison, supra*, 432 U.S. at 82, quoted at p. 2 *supra*.)

holding that cumulative length of service is the indispensable requirement for § 703(h) purposes) the simple fact is that the system involved in this case met that criterion.<sup>16</sup>

### III. The Proper Disposition of This Case

There remains the question of the proper disposition of this case. The district court granted motions to dismiss under Rule 12(b)(6). That disposition was improper, for the complaint, construed most favorably to the plaintiff, alleged that the seniority system was discriminatorily motivated. If that is proven, the seniority system would be outside the protection of § 703(h) because of the proviso thereto. (See *Hardison, supra*, 432 U.S. at 82, quoted at p. 2, *supra*.) The Court of Appeals' error was to hold that the agreement did not establish a "seniority system," thereby relieving the plaintiff of the need to prove bad motive. The judgment of the Court of Appeals should therefore be reversed and the cause remanded to the district court with directions to allow the plaintiff to attempt to so prove.

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<sup>16</sup> Ultimately, the unhappiness of the court below flowed from a different factor. That court lamented that because work opportunities in recent years have diminished, it is impossible for *any* employee, black or white, who has entered the industry in recent years to achieve permanent status. But this simply means that all those who *do* enjoy permanent status were employed in the industry prior to those who, because they came later, encountered the industry's decline. By definition, a system which awards preference (e.g., permanent status) to those who were hired first does not *violate* the "fundamental component" which the court below demanded—*viz.*, that longer cumulative service be preferred—it vindicates that "component."

**CONCLUSION**

For the above stated reasons the decision below should be reversed and the cause remanded as suggested in Part III above.

Respectfully submitted,

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**APPENDIX****SHIPPING RULES—JUNE 16, 1978****Preamble**

Every seaman seeking employment through the hiring halls of the Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Waters District (hereinafter called the "Union") shall be shipped pursuant to the following Shipping Rules. Nothing Contained in these Shipping Rules is in any way intended to create any indemnity obligation on the part of either the Union or the Seafarers Welfare Plan.

**1. Seniority**

**A.** Subject to the conditions and restrictions on employment contained in agreements between the Union and contracted Employers and to the Rules set forth herein, seamen shall be shipped out on jobs referred through the Union's hiring halls according to their class of seniority rating.

**B.** The following shall be the classes of seniority rating:

**1.** Class "A" seniority rating, the highest seniority rating, shall be possessed by:

(a) all unlicensed seamen who possessed such rating on Sept. 8, 1970, pursuant to the Shipping Rules then in effect;

(b) all unlicensed seamen who possess Class "B" seniority rating pursuant to these Rules and who have shipped regularly as defined herein for eight (8) consecutive years, provided such seamen have maintained their Class "B" seniority rating without break and provided further that they either have completed satisfactorily the advanced course of training then offered by the Harry Lundeberg School of Seamanship for the Department in which such seamen regularly ship or possess a rating other than Entry Department ratings specified in Rule 3A; and

(c) all unlicensed seamen who have been upgraded to

Class "A" seniority rating by the Seafarers Appeals Board pursuant to the authority set forth herein.

2. Class "B" seniority rating, the second highest seniority rating, shall be possessed by:

(a) all unlicensed seamen who possessed such rating on Sept. 8, 1970 pursuant to the Shipping Rules then in effect:

(b) all unlicensed seamen who possess Class "C" seniority rating pursuant to these Rules and who have shipped regularly as defined herein for two (2) consecutive years; and

(c) all unlicensed seamen who possess Class "C" seniority rating pursuant to these Rules and who have graduated from the Harry Lundeberg School of Seamanship entry rating training program and have been issued a ship assignment in accord with these Rules.

3. (a) During any period of emergency unlicensed seamen who have made application for entry rating training at the Harry Lundeberg School of Seamanship and who are awaiting acceptance for such school and who have successfully completed the prescribed special entry program, may be assigned a seniority classification of "C-Plus".

(b) Class "C" seniority rating the lowest seniority rating, shall be possessed by all unlicensed seamen who do not possess either Class "A", Class "B" or Class "C-Plus" seniority ratings.

C. A seaman shall be deemed to have shipped regularly within the meaning of these Rules if he has been employed as an unlicensed seaman no less than ninety (90) days during each calendar year aboard one or more American-flag merchant vessels covered by a collective bargaining agreement between the Union and the owner or operator of such vessels.

D. Employment by or at the request of, or election to any office or job in, the Union shall be the equivalent of covered

employment described in the preceding paragraph; and seniority credit under these Rules shall accrue during the period that such employment, office of job is retained.

E. Seniority credit shall be accrued on the basis of total covered employment, without regard to whether such employment was served in the Deck, Engine or Steward Departments.

F. The ninety (90) day period of employment required of a seaman during any year to constitute shipping regularly within the meaning of these Rules shall be reduced proportionately in accord with the amount of time spent by such seaman during that year as a bonafide in- or out-patient in the continuing care of a U.S.P.H.S. or other accredited hospital. (For example, four (4) months in-patient time during a given calendar year reduces the ninety (90) day employment requirement for that year by one-third to sixty (60) days.

G. In the event a seaman possessing less than Class "A" seniority rating fails to ship regularly within the meaning of these Rules during a particular year, he shall lose all accumulated employment credit for that and all preceding years in his then current seniority rating.

H. In the event a seaman's covered employment has been interrupted by circumstances beyond his control, resulting in his failure to ship regularly within the meaning of these Rules, the Seafarers Appeals Board may, upon application of the affected seaman, grant such total or partial seniority credit for the time lost as the Board may deem necessary in its sole discretion to avoid undue hardship.

I. In the event a seaman's covered employment is interrupted by service in the Armed Forces of the United States, resulting in his failure to ship regularly within the meaning of these Rules, such seaman shall suffer no loss of seniority credit accrued prior to his entry of military service if he registers to ship pursuant to these Rules within one hundred



twenty (120) days following his separation from military service.

## 2. Shipping Procedure

A. Subject to the specific provisions of these Rules, unemployed seamen shall be shipped only if registered as provided herein and in the order of the priorities established in Rule 2 C (3) hereof.

B. The following rules shall govern the registration of unemployed seamen for shipping through Union hiring halls:

1. Unemployed seamen shall register only at the port through which they desire to ship. No seaman shall be registered at more than one port at the same time, nor if they are employed aboard any vessel.

2. All seamen possessing U.S. Coast Guard endorsements, verifying certified deck or engine ratings, shall be registered in Group I or Group II of their respective Departments. In the Steward Department, seamen shall be registered in Group I-S. I or II upon presentation of their seniority identification card and providing proof of qualification for such registration. All other seamen who possess Class "A" or "B" seniority ratings shall be registered as "Entry Ratings" as defined in Rule 3, Departments and Groups and may bid for any job in the "Entry Ratings" Department. All other seamen who possess Class "C" seniority ratings shall be registered as "Entry Ratings", as defined in Rule 3, Departments and Groups, and may register for only one Department, to wit, Deck (Ordinaries on Watch, O.S. Deck Maintenance); Engine (Wiper, General Utility Deck/Engine); and Steward (Utility Messmen, Waiters, Messman, General Steward's Utility). Upon attaining endorsements from the U.S. Coast Guard of certified ratings, in the Group I or II category, in either the Deck or Engine Department as defined in Rule 3, Departments and Groups, or having sailed in the Steward Department for a minimum of six (6)

months, application may be made to the Seafarers Appeals Board for consideration for permanent registration in the Deck, Engine or Steward Departments.

3. Shipping registration cards shall be non-transferable and shall be issued at Union hiring halls only upon application in person by seamen desiring same. However, resident seamen at the Seafarers International Union Alcoholic Rehabilitation Center, Piney Point, Maryland who are not registered at a port prior to arrival at the Center may be registered at the port of their choice upon arrival at the Center. Shipping registration cards shall be time and date stamped when issued and shall show the registrants class of seniority rating, Department and Group.

4. Shipping registration cards shall be issued during the regular business hours of the Union's hiring halls. Every seaman desiring to register must possess and submit all documents required by the United States Coast Guard and by applicable law for employment as a merchant seaman aboard U.S.-flag vessels, and, in addition, a valid, current United States passport or evidence that a United States passport has been applied for within two (2) weeks of the date of registration. At the time of registration each seaman is responsible for producing sufficient evidence to establish his class of seniority rating. For this purpose an appropriate seniority identification card issued by the Union shall be deemed sufficient, although other official evidence of employment, such as legible U.S. Coast Guard discharges, may also be submitted.

5. In ports where the Seafarers Welfare Plan maintains a clinic, no seaman shall be registered for shipping unless he submits a valid Seafarers Welfare Plan clinic card at the time of registration.

6. To remain valid, seniority registration cards must be stamped once each month in the port of issuance. The dates and times for such stamping shall be determined by the

Port Agent for each port, and each registrant shall be notified of the dates and times for stamping when he receives his shipping registration card. A seaman who fails to have his shipping registration card so stamped during any month shall forfeit the same and shall be required to re-register. In the event circumstances beyond his control prevent a seaman from having his shipping registration card so stamped, the Port Agent may stamp such card as if the seaman had been present on the required time and date, upon submission by the seaman of adequate evidence to the circumstances preventing his personal appearance.

7. Subject to the provisions of these Rules, shipping registration cards shall be valid only for a period of ninety (90) days from the date of issuance. If the ninetieth (90th) day falls on a Sunday, a national or state holiday, or on a day on which the Union hiring hall in the port of registration is closed for any reason, shipping registration cards which would otherwise expire on such day shall be deemed valid until the next succeeding business day on which the said hiring hall is open. Shipping registration cards' periods of validity shall also be extended by the number of days during which shipping in the port of registration has been materially reduced by strikes affecting the maritime industry generally or by other similar circumstances.

C. The following Rules shall govern shipping of registered seamen through Union hiring halls:

1. Seamen shall be shipped only through the hiring hall at the port where they have registered for shipping. No seaman shall be shipped on a job outside of the Department or Group in which he is registered except under emergency circumstances to prevent a vessel from sailing short-handed, or as otherwise provided in these Rules.

2. Jobs referred to the Union hiring hall shall be announced and offered to registered seamen at the times and according to the procedures set forth in Rule 4 hereof. At

the time each job is so offered, registered seamen desiring such job shall submit their shipping registration cards, U.S. Coast Guard Merchant Mariner's documents, and valid Seafarers Welfare Plan clinic cards to the hiring hall, dispatcher. Registration cards of seamen at the Seafarers International Union Alcoholic Rehabilitation Center, who have been registered in accordance with Rule 2.B.(3), as amended, and are certified as ready for employment, shall be considered along with the registration cards of seamen who are present in the hiring hall at the time the job is called. The job so offered shall be awarded to the seamen in the appropriate Department and Group possessing the highest priority, as determined pursuant to Rule 2.C.(3) hereof.

3. Within each Department, seamen of higher seniority rating shall have priority for jobs over seamen of lower seniority rating, even if such higher seniority seamen are registered in a different Group from that in which the offered job is classified. As between seamen of equal seniority ratings within the same Department, priority shall be given to the seamen registered for the Group in which the offered job is classified. In the event seamen of equal priority under this paragraph bid for the same job, the job shall be awarded to the seaman possessing the earliest dated shipping registration card.

4. Notwithstanding any other provisions of these Rules, no job shall be awarded to a seaman who is under the influence of alcohol or drugs at the time such job is offered; nor shall any seaman be awarded any job unless he is qualified therefor in accord with law or unless he submits, if necessary, appropriate documents establishing such qualifications.

5. The seaman awarded a job under Rule 2C(2) hereof shall immediately surrender his shipping registration card and shall receive two (2) job assignment cards containing his name and the details of the job. When reporting aboard his vessel, the seaman shall present one (1) job assignment



card to the head of his Department and the other to the Union department delegate.

**D.** A seaman who quits or is fired from a job during the same day on which he reports for such job shall retain his original shipping registration card if he has received no compensation for such day's employment and if he reports back to the dispatcher on the next succeeding business day. A seaman who quits or is fired after the day he reports for a job shall secure a new shipping registration card.

**E.** A seaman who receives job assignments pursuant to Rule 2.C.(5) hereof and subsequently rejects or quits the same on two (2) occasions within the period of his shipping registration card's validity shall forfeit his shipping registration card and shall secure a new shipping registration card.

**F.** All seamen registered for shipping, other than those possessing Class "A" seniority rating, who are unavailable to accept or fail or refuse to accept three (2) jobs for which they are qualified during any one (1) period of registration may forthwith be refused the right to register for employment under these Rules for a period of twelve (12) months. Upon application as provided in these Rules the Seafarers Appeals Board may shorten or revoke such refusal of registration for good cause shown.

**G. (a)** Seamen with Class "C-Pluss" seniority rating shipped pursuant to these Rules may retain such jobs for one (1) round trip or ninety (90) days whichever is longer. At the termination of such round trip or on the first opportunity following the ninetieth (90th) day on the job, such seaman shall sign off their vessels, and the vacant job shall be referred to the Union hiring hall.

Any seaman possessing Class "C-Plus" seniority, who fails to remain aboard an assigned vessel for a minimum of ninety (90) days shall subsequently be classed as "C seniority rating, except where his employment has been interrupted by circumstances beyond his control.

**(b)** Seamen with Class "C" seniority rating shipped pursuant to these rules may retain such jobs for one (1) round trip or sixty (60) days whichever is longer. At the termination of such round trip or on the first opportunity following the sixtieth (60th) day on the job, such seaman shall sign off their vessels, and the vacant job shall be referred to the Union hiring hall.

**H.** Seamen with Class "B" seniority rating shipped pursuant to these Rules may retain such jobs for a period of one (1) round trip or one hundred eighty (180) days, whichever is longer. At the completion of such round trip or at the first opportunity following the one hundred eightieth (180th) day on the job, such seamen shall sign off their vessels; and the vacant job shall be referred to the Union hiring hall.

**I.** The provisions of Section G and H of this Rule 2 shall not apply if they would cause a vessel to sail short-handed. For the purposes of these sections the phrase, "round-trip," shall have its usual and customary meaning to seamen, whether such "round-trip" be coastwise, intercoastal or foreign. On coastwise voyages, if a vessel is scheduled to return to the area of original engagement, a seaman of less than Class "A" seniority rating shall not be required to leave such vessel until the vessel reaches the said area. On intercoastal and foreign voyages, if a vessel pays off at a port in the Continental United States other than in the area of engagement, and if such vessel is scheduled to depart from said port of payoff within ten (10) days after arrival to return to the area of original engagement, a seaman of less than Class "A" seniority rating shall not be required to leave the vessel until it arrives in the area of original engagement.

**J.** No seaman shipped under these Rules shall accept a promotion or transfer aboard ship unless there is no time or opportunity to dispatch a seaman to fill such vacant job from a Union hiring hall.



AUG 20 1979

MICHAEL ROBAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 78-1548

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CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

ABRAM BRYANT,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL**

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## INDEX

	Page
I. INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
II. PRELIMINARY STATEMENT .....	2
A. Facts .....	3
B. Proceedings Below .....	5
C. Summary of Argument .....	7
III. ARGUMENT .....	12
A. The Court of Appeals Failed to Recognize that "Seniority Systems" Include Not Only the Concept of Seniority Itself, but Also a Great Variety of Traditionally Associated Rules Related to the Systems' Operation.....	12
B. The Ninth Circuit's Test for "True" Senior- ity Systems Impermissibly Dictates the Sub- stantive Terms of Collective Bargaining Agreements .....	23
C. A Proposed Test for Determining What Con- stitutes a Seniority System Within the Meaning of Section 703(h) .....	29
IV. CONCLUSION .....	35

## II

### TABLE OF AUTHORITIES

Cases:	Page
<i>Aeronautical Industrial District Lodge 727 v. Campbell</i> , 337 U.S. 521 (1949) .....	13, 14, 17, 21, 23, 24, 29
<i>Alexander v. Machinists, Aero Lodge 735</i> , 565 F.2d 1364 (6th Cir.), cert. denied, 436 U.S. 946 (1978) .....	21
<i>Bryant v. California Brewers Association</i> , 585 F.2d 421 (9th Cir. 1978) .....	3, 4, 5, 6, 7, 15, 24, 26, 27, 28, 31, 32, 33, 34, 35
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) .....	13, 16
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	24
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	6, 10, 12, 33, 35
<i>H.K. Porter Co. v. NLRB</i> , 397 U.S. 99 (1970) .....	23, 24
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	2, 3, 6, 8, 10, 11, 12, 13, 20, 22, 24, 27, 28, 31, 32, 33, 34, 35
<i>NLRB v. American National Insurance Co.</i> , 343 U.S. 395 (1952) .....	23
<i>NLRB v. Insurance Agents' International Union</i> , 361 U.S. 477 (1960) .....	23
<i>Tilton v. Missouri Pacific R.R. Co.</i> , 376 U.S. 169 (1964) .....	21
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977) .....	2, 12, 13, 23
<i>United Air Lines v. Evans</i> , 431 U.S. 553 (1977) .....	2, 5, 33
<i>United Steelworkers of America v. Weber</i> , 74 U.S.L.W. 4851 (U.S. June 27, 1979) .....	23

#### Statutes:

##### Civil Rights Act of 1866:

42 U.S.C. § 1981 .....	2
------------------------	---

##### Civil Rights Act of 1964, Title VII:

42 U.S.C. §§ 2000e, et seq. ....	13
42 U.S.C. § 2000e-2(h) .....	passim

## III

### TABLE OF AUTHORITIES—Continued

	Page
Selective Training and Service Act of 1940:	
<i>As amended</i> , ch. 548, 58 Stat. 798 .....	13
Other Authorities:	
Bureau of Labor Statistics, United States Department of Labor, <i>Collective Bargaining Provisions: Seniority</i> , Bulletin No. 980-11 (1949) .....	15, 17
Bureau of Labor Statistics, United States Department of Labor, <i>Major Collective Bargaining Agreements: Administration of Seniority</i> , Bulletin No. 1425-14 (1972) .....	14, 17, 22, 25
Slichter, Healy, and Livernash, <i>The Impact of Collective Bargaining on Management</i> (1960) .....	16, 17, 19, 20, 25, 27
Vaas, <i>Title VII: Legislative History</i> , 7 B.C. IND. & COM. L. REV. 431 (1966) .....	13
Webster's <i>Third New International Dictionary of the English Language Unabridged</i> (1976) .....	16
Wellington, <i>Freedom of Contract and the Collective Bargaining Agreement</i> , 112 U. PA. L. REV. 467 (1964) .....	23
Regulations and Rules:	
Federal Rules of Civil Procedure, Rule 12(b) (6) ..	5



IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1979

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No. 78-1548

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CALIFORNIA BREWERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

ABRAM BRYANT,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council ("EE-AC"), with the consent of all parties, respectfully submits this brief as *Amicus Curiae*.

I. INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of

sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

Because of this interest, EEAC has participated as *Amicus Curiae* in other cases before this Court which involved interpretations of Section 703(h) of Title VII, the statutory provision of primary concern here. See e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

## II. PRELIMINARY STATEMENT

*Amicus* seeks articulation of a reasonable standard for defining "seniority system" pursuant to the protection offered by Section 703(h) of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). That section provides:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Interpreting this provision, the Court held in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977), that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." While the Court had occasion there to outline the appropriate analysis for determining the *bona fides* of a seniority system under Section 703(h), 431 U.S. at 355-56, it was not required to address what constitutes a "seniority system" to begin with, and, thus, what constitutes the scope of the protection provided by this important provision. The present case presents that question.

### A. Facts

For over twenty years, the seniority section of the collective bargaining agreement for the brewing industry in California has contained the provisions here at issue.<sup>1</sup> *Bryant v. California Brewers Association*,

<sup>1</sup> See generally Sections 4 and 5 of the collective bargaining agreement between the California Brewers Association and Teamsters Brewery and Soft Drink Workers Joint Board reproduced in The Appendix to Petition for Certiorari filed herein by The California Brewers Association, *et al.*, at 14-28 (the Appendix to the Petition is hereinafter referred to as "A.P.").

585 F.2d 421, 423 (9th Cir. 1978). Those provisions govern the definition, units, and acquisition of seniority. Thus, the parties' contract provides that "for seniority purposes only" there shall be five classifications of employees, three of which are here significant: new employees, temporary employees, and permanent employees.<sup>2</sup> A.P. 14. Each classification constitutes a separate seniority roster, with such important rights as job referral, bumping, and layoff determined by seniority order within each classification. A.P. 17-19, 24-26. Among the classifications, permanent employees enjoy the greatest benefits and protections, temporary employees come next, and new employees are at the bottom. A.P. 17-18; *Bryant, supra*, 585 F.2d at 423-24. The system also provides rules for the advancement of employees from one seniority classification to the next. A new employee must work sixty days in a calendar year to become a temporary employee, and a temporary employee must work 45 weeks in a year to become a permanent employee. The bargaining agreement does not provide for the carry-over from year to year of the time accumulated toward satisfying these work requirements. Thus, if a temporary employee does not complete the 45-week requirement by the end of a given calendar year, he must start over again the following calendar year. A.P. 14-15; *Bryant, supra*, 585 F.2d

<sup>2</sup> The two other seniority classifications are temporary bottlers and apprentices. A.P., *supra* note 1 at 14. The distinction between temporary bottlers and temporary employees generally is not here material, *id.*, and the apprentice classification does not appear to be involved in this action, see *Bryant v. California Brewers Ass'n, supra*, 585 F.2d at 423-28.

at 423-24. However, vis-a-vis other temporary employees, this person retains his competitive seniority. A.P. 17-19. As a result, longer-term temporary employees enjoy superior protection against layoff and superior rights to recall should layoff occur and, therefore, have the best chance of becoming permanent employees. A.P. 17-19, 24.

Respondent Bryant has challenged this system on the ground that it unlawfully perpetuates prior discrimination. *Bryant, supra*, 585 F.2d at 427-28.<sup>3</sup> While direct challenge to this alleged past discrimination is now foreclosed as untimely, *United Air Lines v. Evans*, 431 U.S. 553, 558, 560 (1977), respondent nonetheless seeks a remedy on the theory that the 45-week requirement, together with diminished employment opportunities in the industry, currently makes it virtually impossible for any employee, black or white, to attain permanent status. As a result, respondent alleges, blacks are locked into the temporary classification and excluded altogether from the permanent one. *Bryant, supra*, 585 F.2d at 424; A. 16-17.

#### B. Proceedings Below

On appeal from dismissal of the complaint pursuant to FED. R. CIV. P. 12(b)(6), the court of appeals below reversed, holding that respondent may go to trial on his allegation that the 45-week provision of the collective bargaining agreement, though neutral on its face, has a disparate impact on employment opportunities for blacks. *Bryant, supra*,

<sup>3</sup> See Respondent's Second Amended Complaint, ¶¶ 13-15, reproduced in the Appendix filed jointly herein at 16-17 (the joint Appendix is hereinafter referred to as "A.").



585 F.2d at 423, 428. In that court's view, the 45-week provision "in effect preserves an all White class of permanent brewery employees," and thus may be unlawful under the disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). *Bryant, supra*, 585 F.2d at 423, 428.

The unions and employers had submitted that even if the 45-week provision of the collective bargaining agreement did have the alleged effect of perpetuating past discrimination, it nonetheless was immune from attack, because the provision is part of a *bona fide* seniority system and protected by Section 703(h) as construed in *Teamsters*. ~~The~~ court of appeals rejected this defense on the ground that the 45-week provision is not part of a seniority system at all. *Bryant, supra*, 585 F.2d at 425-27.

Starting from the premise that the "fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases," the court of appeals found the 45-week provision not part of a seniority system for three related reasons. *Bryant, supra*, 585 F.2d at 426. First, in the court's view, "the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon length of the employee's accumulated service," since "the acquisition of permanent status may be independent both of total time worked or overall length of employment." *Id.* For example, one employee might satisfy the requirement in the very first year, whereas another employee might have worked several years, yet have been laid off each year prior to attaining permanent status. As a result, the second

employee could have both greater employment seniority (time since initial date of hire) and accumulated service than the first, yet occupy an inferior seniority status. This, the court concluded, is inconsistent with how a "true" seniority system should operate. *Bryant, supra*, 585 F.2d at 426-27. Second, the court also regarded the 45-week provision as not part of a seniority system because, rather than providing for incremental increases in employment rights or benefits based on overall length of service, the provision was viewed by the court as "an all-or-nothing proposition." Again, this was viewed as inconsistent with the "fundamental" concept of seniority. *Bryant, supra*, 585 F.2d at 427. Third, the court stated that "seniority rights under a true seniority system usually accumulate automatically over time," whereas under the 45-week provision, "an employee's chances of satisfying the provision automatically terminate at the end of each year." *Id.* In the court's view, this made "the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." *Id.* For all these reasons, the court of appeals below concluded that the 45-week provision was not part of a seniority system and that Section 703(h), therefore, did not apply. *Id.*

### C. Summary of Argument

In enacting Section 703(h), Congress sought to preserve employees' seniority expectations as embodied in the various seniority systems of American industry. Congress did not specify the type of sen-

iority system entitled to protection other than that the system be *bona fide*. Rather, in recognition of the myriad conditions existing in the American work place, Congress chose to rely on what has heretofore been a basic tenet of our national labor policy to provide employers and unions broad freedom to arrive at collective bargaining provisions that best suit their individual needs. Traditionally, that policy has counseled restraint from dictating to employers and unions what the terms of their agreement must be. The approach of the Ninth Circuit in this case to the determination of what constitutes a "true" seniority system is in fundamental conflict with that national policy as incorporated into Section 703(h).

The conflict arises from two distinct but related errors in the analysis of the court of appeals. First, the court mistakenly has regarded a narrow and particular concept of seniority as coterminous with the breadth of seniority *systems*. What it thereby failed to recognize is that a seniority system not only consists of some core seniority principle, such as the increase in employment rights or benefits with service, but also includes a host of integrally related provisions that are necessary for the operation of the system as a whole. These rules determine, among other things, how seniority is defined, measured, acquired, transferred, lost, regained and applied. Together the core seniority principle and the related rules form the seniority system.

In disregarding this unity, the Ninth Circuit has excluded from the reach of Section 703(h) the major components of vast numbers of seniority systems nationwide. Indeed, the unit-definition and transfer rules involved in *Teamsters* would in all likelihood not

survive the Ninth Circuit's narrow test. If this test were adopted generally, great numbers of similar seniority rules would be exposed to attack, and the seniority expectations of millions of workers whom Congress sought to protect through Section 703(h) would be in jeopardy.

The second and related error in the Ninth Circuit's approach is that it has dictated a particular way in which seniority systems must operate. Only if such systems involve (1) an increase in employment rights with service that occurs (2) incrementally as opposed to in an all-or-nothing fashion and (3) automatically with time rather than depending on other facts as well, will such arrangements be regarded as "true" seniority systems and eligible for Section 703(h) protection, regardless of their *bona fides*. Thus, contrary to the important and long-standing national policy noted above, to refrain from dictating the terms of parties' collective bargaining agreements, the rule of the Ninth Circuit would require that the seniority provisions of collective bargaining agreements, regardless of the circumstances under which they arose or their *bona fides*, conform to a particular, monolithic type. Again, all those deviating from the dictated pattern would lose the benefits of congressional protection, as would employee seniority expectations that had developed under them.

The approach of the Ninth Circuit is not only impermissibly narrow and particularistic, in conflict with national labor policy, but also unnecessary and in conflict with policies of Title VII as well. To be sure, Congress did not intend to provide a talismanic immunity to every provision remotely related to seniority, regardless of the nature of its impact upon



equal employment opportunities. At the same time, Congress clearly did intend to protect certain seniority expectations of incumbent employees, at least to the extent that these expectations are placed in jeopardy simply because the seniority system from which they derive tends to perpetuate past discrimination.

This suggests an accommodation between the national labor policy of respecting bargaining freedom on the one hand, and giving full reach to the intended remedial policies of Title VII on the other. Thus, where a provision arguably part of a seniority system is challenged under the *Griggs* doctrine for disparate impact, *Amicus* respectfully urges the following test be adopted for coverage under Section 703(h): First, in order to determine whether the provision is in fact part of a seniority system, the courts should look only for a nexus between the provision in question and the operation of the system as a whole. The customary types of rules for the definition, measurement, acquisition, transfer, and application of seniority, among others, would provide guidance in locating this nexus. Only if the provision could be said to have no relation to seniority, should it not be regarded as part of a seniority system under Section 703(h). In this way, arbitrary limitations upon the customary freedom accorded to collective bargaining can be avoided.

Second, once the provision is thus determined to be part of a seniority system, the analysis should proceed to a determination of *bona fides* as outlined in *Teamsters*. It was in confusing the two analyses—the existence of a seniority system with the *bona fides* of that system—that the Ninth Circuit committed error. While the court's confusion, caused by

its concern that Section 703(h) not sweep too broadly, is perhaps understandable, it is nonetheless unnecessary. The approach suggested here would provide an appropriate limitation to the reach of Section 703(h) without arbitrarily limiting as well the freedom of the collective bargaining process.

Through the enactment of Section 703(h), Congress sought to protect employees' seniority expectations that might otherwise be subject to Title VII attack simply because the seniority systems under which they have worked may perpetuate some past practice on the part of the employer. However, there is no indication that Congress intended this same provision to insulate employment practices which are independently discriminatory, apart from the perpetuation of the past, simply because such practices may be written into a seniority system. This suggests that in the unusual circumstance where a seniority system results in disparate impact other than through the perpetuation of some past practice, the *Teamsters bona fides* analysis should be supplemented by a consideration of the source of the disparate impact alleged. If, and to the extent that, the disparate impact results merely from the perpetuation of some past condition, then, consistent with the legislative intent underlying Section 703(h), the provision should not be subject to Title VII attack so long as it is otherwise *bona fide*. However, if, and to the extent that, the provision itself has a disparate impact independent of any past practices of the employer, as might be involved with an educational requirement or test, then the protection should not automatically apply, whether the provision is part of a seniority system or not. Rather, in such a case, the provision with disparate impact should be immune from attack



only if justified by valid business necessity or job relatedness as required by *Griggs*. In this way, the balance between freedom of bargaining and the remedial goals of Title VII would be preserved.

The 45-week provision would appear to meet both prongs of the suggested test. As a seniority acquisition rule, it has the required nexus to seniority, and, since its alleged disparate impact occurs solely through the perpetuation of alleged prior discrimination, it comes within the intended Congressional protection. There remains to be determined, however, whether the provision and the seniority system of which it is a part otherwise comply with the *bona fides* requirements of *Teamsters*, and a remand would appear appropriate for that determination.

### III. ARGUMENT

#### A. The Court of Appeals Failed to Recognize that "Seniority Systems" Include Not Only the Concept of Seniority Itself, but Also a Great Variety of Traditionally Associated Rules Related to the Systems' Operation

In the enactment of Section 703(h) "the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." *Teamsters supra*, 431 U.S. at 353. While intending to provide broad protection for the seniority expectations of employees, *Teamsters, supra*, 431 U.S. at 352-53, 355; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-83 (1977), Congress did not attempt to spell out in detail the type of seniority rights entitled to protection. See 42 U.S.C. § 2000e-2(h). Rather, Title VII leaves the term "seniority

system," as used in Section 703(h), undefined.<sup>4</sup> See 42 U.S.C. § 2000e. The situation is therefore analogous to that faced by the Court in *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949), where it was necessary to construe the term "seniority" as used in Section 8 of the Selective Training and Service Act of 1940, ch. 720, § 8, 54 Stat. 885 (1940), as amended by ch. 548, 58 Stat. 798, which provided that a veteran returning from military service was to be reinstated to his former position "without loss of seniority." In the course of determining what Congress there meant by "seniority," Mr. Justice Frankfurter outlined the approach appropriate here as well:

[T]he Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. *We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority . . . guaranteed [by the Act].*

337 U.S. at 526 (emphasis added).

<sup>4</sup> Likewise, the legislative history gives no indication that Congress attributed any special definition to the term. See *Teamsters, supra*, 431 U.S. at 355 n.41. For discussions of the legislative history to Section 703(h), see *Teamsters, supra*, 431 U.S. 352-53; *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 79-83; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758-62 (1976); and see generally Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 444-45 (1966).

In "looking to the conventional uses of the seniority system in the process of collective bargaining," one immediately notes their enormous complexity and variety. As the Court observed in *Campbell*:

There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, *Trends in Collective Bargaining* 100-102 (1945); Harbison, *Seniority Policies & Procedures as Developed through Collective Bargaining* 1-10 (1941).

337 U.S. at 526-27.<sup>5</sup>

<sup>5</sup> *Accord*, Bureau of Labor Statistics, United States Department of Labor, *Major Collective Bargaining Agreements: Administration of Seniority*, Bulletin No. 1425-14 (1972) (hereinafter referred to as the "1972 BLS Seniority Bulletin"), which notes:

Of the many provisions found in collective bargaining agreements, those governing the operation of seniority

Without regard for the congressional purpose to preserve this variety, the Ninth Circuit has attempted to reduce seniority systems to their bare bones, namely, "the concept that employment rights should increase as the length of an employee's service increases." *Bryant, supra*, 585 F.2d at 426. This Court has previously warned against such an approach:

To draw from the . . . Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in lay-offs is to ignore a vast body of long established controlling practices in the process of collective

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systems are among the most important and the most complex. They are important because seniority is a set of rights and privileges which normally becomes increasingly valuable to an employee over time. They are complex because seniority may have many applications, each subject to many conditions.

*Id.* at 1. In this study, the Bureau reports the results of its examination of 1,974 major collective bargaining agreements, each covering 1,000 workers or more, for a total coverage of some 8.2 million workers. Of these, some 1,501 agreements covering 6.1 million workers referred to seniority. "With the exception of agreements in the apparel and leather goods industries, all or nearly all the agreements in manufacturing established the principle of seniority." *Id.* at 2. In addition to numerous statistics on the prevalence of various types of seniority provisions, the Bureau's report also reproduces from the agreements examined some 182 different types of seniority clauses. See also Bureau of Labor Statistics, United States Department of Labor, *Collective Bargaining Provisions: Seniority*, Bulletin No. 980-11 (1949) (hereinafter referred to as the "1949 BLS Seniority Bulletin"), where some 269 different seniority provisions are reproduced.



bargaining of which the seniority systems to which the Act refers is a part.

*Campbell, supra*, 337 U.S. at 527. The commentators as well have admonished that seniority systems are not the function of any single variable:

Up to this point the word seniority has been defined arbitrarily as an employee's length of continuous service with the company. This broad definition is reasonably accurate insofar as eligibility for benefit programs is concerned. It serves well in the application of benefit seniority. However, *the definition may be entirely inadequate and misleading for those items involving the use of competitive status seniority to determine order of layoff, recall, promotion, and other preferential treatment. For these areas the definitions are almost too varied to enumerate.*

Slichter, Healy, and Livernash, *The Impact of Collective Bargaining on Management* 116 (1960) (emphasis added) (hereinafter referred to as "*Slichter*").<sup>6</sup>

In addition to the bare bones acknowledged by the court below, it is necessary to recognize that seniority operates within the context of a "system," as noted by the terminology in Section 703(h). *Webster's Third New International Dictionary of the English Language Unabridged* 2322 (1976) defines "system"

<sup>6</sup> The Court has relied on this treatise previously, citing it in *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 766, in support of the Court's observation that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic system of this Nation."

as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." The court below recognized a particular "common plan" but failed to appreciate the "diverse parts." To remedy this omission, and in order to arrive at a workable guide for what constitutes a seniority system for purposes of Section 703(h), the directive of *Campbell* to look to "the conventional uses of the seniority system in the process of collective bargaining," 337 U.S. at 526, provides useful guidance. Such an inspection reveals that the operation of the seniority principle in the context of collective bargaining involves both the "fundamental concept" of employment rights increasing with service, as well as a vast array of associated "ground rules." Together, the fundamental concept and these ground rules form the "seniority system."<sup>7</sup>

While there is no customary set of *particular* ground rules constituting a seniority system, the rules do fall into recognizable *types*. *Slichter, supra*, at 115, provides a useful list:<sup>8</sup>

<sup>7</sup> See generally 1949 BLS Seniority Bulletin, *supra* note 5; 1972 BLS Seniority Bulletin, *supra* note 5; and *Slichter, supra* text accompanying note 6 at 104-139.

<sup>8</sup> Cf. 1972 BLS Seniority Bulletin, *supra* note 5 at 1, where the Bureau describes the provisions there studied in the following terms:

In addition to describing the applications of seniority, the provisions usually define the circumstances under which seniority may be acquired, transferred, modified, lost, and, if such is permitted, regained.

See also 1949 BLS Seniority Bulletin, *supra* note 5 at viii, where the table of contents divides the seniority clauses there reproduced into the following types:

[Footnote continued on page 18]



- (1) definition and measurement of seniority of service,
- (2) acquisition of seniority,
- (3) loss of seniority,
- (4) use of superseniority,
- (5) effect of merger and succession on seniority rights
- (6) seniority of employees outside the bargaining unit, and
- (7) special arrangements in administering seniority rosters.

Among each of these types, there is substantial variation, with no single rule being characteristic of any "true" seniority system. For example, among the rules relating to "definition and measurement," distinctions are often drawn between the measurement of seniority and the scope of its application. Seniority may be measured by length of service with an employer, in a plant, department, or job, or according to length of time within a given seniority classification, such as the new-employee, temporary-employee, and permanent-employee divisions at issue here. There may also be distinctions between seasonal and "year-round" employees. However measured, other rules may then determine the unit to

<sup>8</sup>[Continued]

Definition and objectives of seniority, . . . Acquisition and calculation of seniority, . . . The seniority unit, . . . Exceptions to seniority rules, . . . Seniority status in intra-plant transfers or mergers, . . . Retention and loss of seniority, . . . Special preference based on seniority, . . . [and] Seniority lists and administration of seniority.

which seniority is to be applied. For example, seniority may be measured on a plant-wide basis, but layoffs governed by the application of this plant-wide seniority on a departmental basis. Further, the unit for measurement and the scope of application can vary according to the particular right or benefit involved. The possible variations are virtually endless. See *Slichter, supra*, at 116-123.

Similar complexity may be found in each of the other areas, with the variation in rules for acquiring seniority particularly apposite here. "Under most agreements an employee does not acquire any seniority until he has worked beyond the prescribed probationary period . . . ." *Slichter, supra*, at 123. However, the length of the probationary period varies from thirty, sixty or ninety days in some agreements to six months or more in others. Further, as *Slichter* describes:

[T]he parties have learned through experience the necessity of defining more carefully the time credit to be given a probationer toward the satisfaction of his period. For example, if a new employee works intermittently for a company so that a total of 60 days are worked in a one-year period on eight different employment occasions, has he met the 60-day probationary requirement? One agreement resolves these questions by stating that if a probationary employee returns after losing ten days consecutively, he will start as a new employee. But if he is laid off, he will retain credit for time worked if recalled within six months. Another company and union have agreed that to become a seniority employee, a probationer must have been employed three months within the year following the date of hire

or last rehire, whichever is later; layoff periods or leaves of absence for any reason are not to count toward the three months.

*Slichter, supra*, at 123-24.

From these examples, drawn from only two of the various types of seniority ground rules typically involved in collective bargaining agreements, it may be seen that a seniority system simply has no meaning apart from these rules. They are what determine how seniority is acquired, measured, transferred, lost, and applied. Thus, if Section 703(h) is to provide any meaningful immunity to the operation of seniority systems at all, it can only do so in regard to these rules.

Prior decisions of this Court have recognized the inclusion of seniority ground rules within the concept of a seniority system. For example, in *Teamsters, supra*, the Court had to consider not only the general question of whether a seniority system which perpetuates prior discrimination is entitled to Section 703(h) protection at all, but also whether in that case the protection extended to two particular seniority ground rules alleged to have a disparate impact upon Blacks and Hispanics. These were (1) the rule defining seniority units along departmental lines, and (2) the separate rule providing that an employee transferring from one departmental unit to another must forfeit his accumulated competitive seniority. Properly, there was no question but that these rules were a part of the seniority system involved. See *Teamsters, supra*, 431 U.S. at 343-356.

Other decisions of the Court have also recognized that what are here termed "ground rules" are very

much an integral part of seniority systems. In *Aeronautical Industrial District Lodge 727 v. Campbell, supra*, for example, the Court noted as part of the "seniority principle" the range of such rules, including "the time when seniority begins," the "determination of the units subject to . . . seniority," the "consequences which flow from seniority," whether "probationary conditions must be . . . met before seniority begins," whether "it becomes retroactive to the date of employment" or "only as from the qualifying date," and whether seniority "is determined on a company basis," an occupational basis, or a plant basis, 337 U.S. at 526-27. See also *Tilton v. Missouri Pacific R.R. Co.*, 376 U.S. 169, 181 (1964) (recognition of training requirement as a legitimate aspect of seniority).<sup>9</sup>

<sup>9</sup> The Sixth Circuit in *Alexander v. Machinists, Aero Lodge 735*, 565 F.2d 1364 (6th Cir.), cert. denied, 436 U.S. 946 (1978), has also recognized that seniority ground rules are properly included with the concept of seniority systems. There, the collective bargaining agreement provided that employees having prior experience in a particular job, called "job equity," would have preference over those lacking job equity, both in regard to promotions and bumping rights. 565 F.2d 1376-77. In rejecting a claim that this provision was not entitled to Section 703(h) protection, the court properly observed:

With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of a bona fide seniority . . . system. A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters*



In summary, a review of the "conventional uses of the seniority system in the process of collective bargaining" reveals that such systems are not limited to any one "fundamental component," but rather include as well a vast array of integrally related rules that determine how in fact seniority systems operate. Therefore, if Section 703(h) is to provide protection to the vested seniority rights of employees, as Congress clearly intended, *Teamsters, supra*, 431 U.S. at 352-53, then the term "seniority system" as used in that provision must be understood to include such rules. Accordingly, the Ninth Circuit's conclusion that the 45-week provision is not part of a "seniority system" for purposes of Section 703(h) must be rejected, since this provision is clearly a rule related to and governing the acquisition of seniority.<sup>10</sup>

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to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.

565 F.2d 1378-79.

<sup>10</sup> According to data reported in the 1972 *BLS Seniority Bulletin, supra* note 5 at 33, rules governing the acquisition of seniority appeared in approximately 76% of the agreements studied having seniority provisions. Of these, approximately 20% provided that if probationary service were interrupted (for example, by layoff), the credit accumulated would be retained, but the probationary period, as with the 45-week requirement, had to be completed within a specified amount of time. Such provisions were found in agreements affecting almost 50% of the workers covered by seniority provisions.

### B. The Ninth Circuit's Test for "True" Seniority Systems Impermissibly Dictates the Substantive Terms of Collective Bargaining Agreements

As recognized in numerous decisions of this Court involving both the National Labor Relations Act and Title VII, it is a fundamental tenet of our national labor policy to provide broad freedom to employers and unions to work out collective bargaining provisions that best suit their individual needs. Concomitantly, that policy counsels strongly against dictating to employers and unions what the terms of their agreements must be. See, e.g., *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 79-83; *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960); and *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964).<sup>11</sup>

The same policy applies to the interpretation of "seniority system" under Section 703(h). As with the analogous provision under the Selective Training and Service Act of 1940, "the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a [particular] system of seniority but recognizing its operation as part of the process of collective bargaining." *Campbell, supra*,

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<sup>11</sup> Cf. *United Steelworkers of America v. Weber*, 47 U.S.L.W. 4851, 4854 (U.S. June 27, 1979), where the Court observed that Title VII is to be interpreted generally such that "'management prerogatives and union freedoms . . . [are] left undisturbed to the greatest extent possible,'" quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2, at 29 (1963).



337 U.S. at 526. This "process of collective bargaining" has produced "great variations in the use of the seniority principle," as the Court has noted, *Campbell, supra*, 337 U.S. at 526, and "[t]he legislative history [of Section 703(h)] contains no suggestion that any one system was preferred," *Teamsters, supra*, 431 U.S. at 355 n.41.

The approach of the Ninth Circuit to the determination of what constitutes a "true" seniority system under Section 703(h) is in fundamental conflict with this policy. According to its view, seniority systems, to be accepted as such, must operate in a very particular way. They must involve: (1) increases in employment rights and benefits that occur (2) "incrementally" as opposed to in an "all-or-nothing" fashion and (3) be "automatically" based on service alone rather than in combination with any other factor that is "susceptible to discriminatory application." *Bryant, supra*, 585 F.2d at 427. Further, a provision is not part of a "true" seniority system if it results in later-hired employees acquiring greater rights than other employees "regardless of whether one measures seniority by length of employment in a bargaining unit, plant, company, or industry." *Id.* This attempted definition of the "true" seniority system could not be more at odds with the national labor policy to afford maximum "freedom of contract" to the collective bargaining process. See *H.K. Porter Co. v. NLRB, supra*, 397 U.S. at 108.<sup>12</sup>

<sup>12</sup> Cf. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978), where the Court admonished the court of appeals below in that case not to require "businesses to adopt what it perceives to be the 'best' hiring policy" in terms of minimal adverse impact on minorities. Analogously, employers and

If adopted, the lower court's test for the "true" seniority system would place outside Section 703(h) scores of provisions nationwide.<sup>13</sup> One example is a typical probationary system. Suppose that a union and employer have agreed that what best suits their particular circumstances is an arrangement with the following features: (1) a new employee must work sixty days before acquiring seniority;<sup>14</sup> (2) there is no contractual limitation on discharge during this period;<sup>15</sup> (3) in the event of a layoff or other interruption during the probationary period the time previously worked is preserved but no credit is granted during the interruption;<sup>16</sup> and (4) the contract

unions should not be required to adopt "true" seniority systems that will minimize disparate impact. "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 438 U.S. at 578. *A fortiori*, this admonition applies to collective bargaining.

<sup>13</sup> See note 10, *supra*.

<sup>14</sup> In the 1972 BLS Seniority Bulletin, *supra* note 5 at 33, the data there reported indicate that of the collective bargaining agreements studied which referred to seniority at all, almost 75% involved some type of probationary period. In the sample studied alone, these agreements with probationary provisions covered over one million workers. *Id.*, Table 2.

<sup>15</sup> Probationary employees typically do not enjoy the standard "just cause" limitation on discharge that applies to permanent employees. See *Slichter, supra* text accompanying note 6 at 124; 1972 BLS Seniority Bulletin, *supra* note 5 at 5.

<sup>16</sup> This type of provision appeared in 88% of the BLS-studied agreements that referred to an interruption of service during the acquisition of seniority. Within the sample alone, such provisions covered over 750,000 workers. 1972 BLS Seniority Bulletin, *supra* note 5 at 33, Table 4.

specifies a time limit within which the probationary period must be completed.<sup>17</sup>

Under the Ninth Circuit's test for "true" seniority systems, this probationary arrangement would fail. First, it "does not provide for incremental increases in employment rights or benefits based on length of overall service." *Bryant, supra*, 585 F.2d 427. Rather, it contains a disapproved "all-or-nothing" feature. Until the employee has worked the requisite sixty days within the specified time period, he remains a temporary, regardless of accumulated service. Secondly, the progression from temporary to permanent is not "automatic." Rather, the employee's "chances of satisfying the provision automatically terminate at the end" of the specified period, if not completed. Thirdly, the arrangement is "susceptible to discriminatory application" since the employer may terminate the employee without cause prior to completing the sixty-day period. Finally, if one employee works straight through and becomes permanent in only sixty days, whereas another employee previously hired has worked a greater number of days but has not become permanent due to intervening layoffs, then the first employee will have greater rights than the second even though the first employee was hired later and has less accumulated service. Such a result does not comport with the Ninth Circuit's "true" seniority system. *Bryant, supra*, 585 F.2d at 426-27.

<sup>17</sup> Such time limits on gaining seniority appeared in over 72% of the BLS-studied agreements referring to an interruption of service during the acquisition of seniority. These time limits covered some 715,000 workers. *Id.*

Standard seniority-based promotion provisions<sup>18</sup> would fare no better if the promotion decision depends upon any factor other than date of hire, since that would make the system nonautomatic and "particularly susceptible to discriminatory application," both forbidden features.<sup>19</sup> *Bryant, supra*, 585 F.2d at 427.

Finally, the seniority system involved in *Teamsters* itself would not pass the Ninth Circuit's test. That system involved departmental seniority units, and employees transferring from one department to another had to forfeit their accumulated seniority and start at the bottom of the new department's list. As a result of these rules, an employee transferring to a new department might have both an earlier date of hire and greater accumulated service than others there, yet be lower on the seniority roster. *Teamsters, supra*, 431 U.S. at 343-45. Such would not comport with the operation of "true" seniority systems where "employment rights should increase as the length of an employee's service increases." *Bryant, supra*, 585 F.2d at 426.

While the court below attempted to distinguish *Teamsters* in this regard, the effort was not convinc-

<sup>18</sup> "Rarely does one find a contract clause in which seniority is the exclusive criterion for deciding on promotions." *Slichter, supra* at 198.

<sup>19</sup> This is not to suggest that reliance on the non-seniority factor should be totally immune from Title VII scrutiny simply because that factor is used in conjunction with seniority. The *bona fide* test outlined in *Teamsters v. United States, supra*, 431 U.S. at 355-366, serves to protect against abuse. See Section III(C), *infra*.



ing. Referring to *Teamsters*, the court of appeals said that the "fundamental" test of increasing employment rights with increasing service was there satisfied, because "employees with fewer weeks of service in a particular area (company or bargaining unit) could never acquire greater benefits within that area than employees with longer service there." *Bryant, supra*, 585 F.2d at 427. This observation does not effectively distinguish the *Teamsters* system from the one in the brewing industry, however, since it is true in the latter as well that "employees with fewer weeks of service in a particular [classification, e.g., temporary or permanent] could never acquire greater benefits within that [classification] than employees with longer service there." *Bryant, supra*, 585 F.2d at 427. Thus, once the Ninth Circuit's manner of classification is accepted, the matter is resolved, yet the court offers no reason why the classification between departments is permissible but that between temporary and permanent is not. The comment in *Teamsters* that "[t]he legislative history [of Section 703(h)] contains no suggestion that any one system was preferred," *Teamsters, supra*, 431 U.S. at 355 n.41, would appear to indicate otherwise.

In summary, the court below has adopted a narrow and not altogether consistent view of what constitutes a "true" seniority system. But whether consistent or not, the Ninth Circuit's concept of the "true" seniority system is antithetical to the freedom accorded the collective bargaining process by our national labor policy. It places in jeopardy the seniority expectations of the countless employees that work under all of the non-"true" systems. In the enactment of the protections of Section 703(h), there is no

evidence whatsoever that Congress intended any such result.

**C. A Proposed Test for Determining What Constitutes a Seniority System Within the Meaning of Section 703(h)**

The Ninth Circuit's test for determining the existence of a "seniority system" under Section 703(h) is both too narrow (focusing on core seniority to the exclusion of the associated rules) and too specific (permitting only a particular type or "true" seniority system). A careful examination of the policies at work in Section 703(h) suggests both an appropriate definition of "seniority system" and an acceptable principle of limitation.

As noted in preceding sections, Congress has not defined "seniority system" in the statute, and it has thus been necessary to "look to the conventional uses of the seniority system in the process of collective bargaining." *Campbell, supra*, 337 U.S. at 526. That "look" in turn has revealed two important criteria that any definition of seniority system must meet. First, the definition must be sufficiently broad to include not only core concepts of seniority, i.e., employment rights increasing with service, but also the customarily associated rules that determine, among other things, how seniority is defined, measured, acquired, transferred, lost, regained, and applied. Second, any definition of seniority should be consistent with the fundamental tenet of national labor policy to provide unions and employers broad freedom to work out their own collective bargaining agreements, and to avoid dictating the substantive terms of those agreements.



Thus, a proper definition of seniority should not restrict employers and unions to any particular arrangement, "true" or otherwise. Together, these principles indicate that "seniority systems," for purposes of Section 703(h), should be construed broadly and consistently with the great variety of arrangements in existence when Congress enacted the statute. Accordingly, the following test for Section 703(h) "seniority systems" is suggested:

The provisions of a collective bargaining agreement or employment policy<sup>20</sup> shall be deemed a seniority system so long as, in some fashion, employment rights or benefits increase with some measure of time worked or employed. Further, a particular provision shall be regarded as a part of a seniority system so long as there is a nexus between the provision and the operation of that seniority system. Specifically included, among others, are the "ground rules" of seniority systems which determine how seniority is defined, measured, acquired, transferred, lost, regained, and applied. Length of service need not be the sole determinant of the employee rights or benefits in question.

While this test would appear to encompass the national labor policy considerations just noted, it is not here suggested that this be the end of the analysis. Another policy that must be taken into consideration as well is the policy to construe the remedial provisions of Title VII broadly. Clearly, this requires some limitation upon the immunity granted by Section 703(h) even to seniority systems and provisions that meet the above test.

<sup>20</sup> The language of Section 703(h) is not limited to collectively bargained seniority arrangements.

In *Teamsters*, this Court has indicated the proper approach. Thus, it should not be sufficient, in order to acquire the immunity of Section 703(h), that the employment practice in question simply be the result of the operation of a seniority system. One must look further and determine the *bona fides* of that system, including: (1) whether it applies equally to all groups without regard to race, color, religion, sex, or national origin, (2) whether it adversely affects only one group, (3) whether it is rational, and (4) whether it has been negotiated and maintained free of discrimination. *Teamsters, supra*, 431 U.S. at 355-56.

The court below confused its concerns over the *bona fides* of the 45-week rule with the question of whether the requirement was nonetheless part of a seniority system. As a seniority acquisition rule of a type not uncommon in industry, the 45-week provision clearly should be regarded as part of the seniority system. There of course remains to be determined whether the 45-week provision, together with the remainder of the seniority system to which it relates, otherwise meets the *bona fides* requirements of *Teamsters*.

The Ninth Circuit need not have feared that by placing the 45-week rule within the definition of "seniority system," the result would be similarly to immunize a whole variety of employment practices hitherto subject to Title VII challenge. See *Bryant, supra*, 585 F.2d at 427 n.11. First, it would be a rare seniority system indeed which contained the provisions envisioned by the Ninth Circuit. Certainly educational requirements generally would not be entitled to section 703(h) protection since they would

normally lack the essential nexus to the operation of a seniority system. Further, virtually no seniority systems actually in existence contain educational requirements. See generally *Schlicter, supra*; 1972 *B.L.S. Seniority Bulletin, supra*. The hypothetical of the court of appeals thus bears little relationship to industrial reality. Second, were such provisions to be included in a seniority system with any intention of favoring a particular race or sex, they would not meet the "*bona fides*" test of *Teamsters* and would thus not be entitled to Section 703(h) protection. In the rare case where such a provision had the required nexus to seniority and met the *Teamsters bona fide* test, but resulted in disparate impact independent of any past practices of the employer, then the policies underlying Section 703(h) suggest a limiting principle.

Congress enacted Section 703(h) in response to the concern that Title VII would "destroy existing seniority rights," if the tendency of even *bona fide* seniority systems to perpetuate prior discrimination were deemed unlawful. *Teamsters, supra*, 431 U.S. at 350, 352. However, there is nothing in the legislative history to suggest that Congress likewise intended to insulate employment practices which had an adverse impact independent of any past practices of the employer which would not be permitted elsewhere, simply because such practices might be written into a seniority system. This suggests that in the rare circumstance noted above the *Teamsters bona fides* analysis be supplemented by an examination of the source of the disparate impact allegedly caused by the operation of the seniority system. If, and to the extent that, the disparate impact results solely from the

perpetuation of some past condition, then, consistent with the congressional purpose, the seniority expectations of employees who have worked under that system should be protected. Conversely, if, and to the extent that, the alleged disparate impact is independent of any past practice on the part of the employer, then the discriminatory provision should not be immune from Title VII attack, simply because it happens to be a part of the seniority system.

A comparison between the *Teamsters* interdepartmental transfer rule and the hypothetical educational requirement posed by the court below illustrates both the application of the proposed test and why the Ninth Circuit's concerns were unfounded. In *Teamsters*, the transfer rule discouraged movement from the less desirable city-driver jobs to the more desirable long-haul jobs because it required that a transferee forfeit his accumulated seniority and start at the bottom of the roster in the new department. Because of prior discrimination, this transfer rule had the effect of locking blacks and Hispanics into the less desirable city-driver unit.<sup>21</sup> While the rule thus per-

<sup>21</sup> While the pattern perpetuated in *Teamsters*—that of a disproportionately white long-haul unit and a disproportionately black and Hispanic city-driver unit—was the result of prior discrimination by the employer, there would not appear to be any basis under Section 703(h) for requiring that the pattern perpetuated by a seniority system be discriminatorily caused. Otherwise, the result would be an anomalous rule whereby seniority expectations resting upon past discrimination would be protected, whereas those resting upon patterns lawfully originated would not be. Cf. *United Airlines v. Evans, supra*, 431 U.S. at 558-560. Accordingly, a seniority system which perpetuates any past practice, lawful or unlawful, should be entitled to Section 703(h) protection.



petuated past discrimination, it was not discriminatory in and of itself. That is, as the Court observed, it equally discouraged whites as well as blacks and Hispanics within the city-driver unit from transferring. *Teamsters, supra*, 431 U.S. at 344-55. Accordingly, under the proposed test, the seniority system would be entitled to Section 703(h) protection, since the disparate impact results solely from the perpetuation of some past condition.

By comparison, consider the same *Teamsters* seniority system, but assume that instead of the particular transfer rule involved there, the agreement had provided that only employees with high school diplomas could become long-haul drivers.<sup>22</sup> Further, assume that there was a substantially lower incidence of high school diplomas among black and Hispanic city drivers than among white city drivers. Given these conditions, the diploma rule would not apply equally to all city drivers attempting to transfer, but instead would disproportionately screen out blacks and Hispanics. As such, the diploma rule would not be entitled to Section 703(h) protection under the test proposed here, since the disparate impact involved would be caused not by a mere perpetuation of some past practice on the part of the employer, but through a present adverse impact caused by the provision itself.<sup>23</sup>

<sup>22</sup> This assumes *arguendo*, of course, that the lower court's hypothetical educational requirement for entry into a seniority line, *Bryant, supra*, 585 F.2d 427 n.11, would satisfy the test proposed above for what constitutes part of a seniority system to begin with.

<sup>23</sup> That such an educational requirement would not qualify for Section 703(h) protection would not necessarily mean

In contrast to the diploma requirement, the 45-week provision would meet both prongs of the suggested test. First, as a seniority acquisition rule of a type not uncommon in industry, it has the required nexus to seniority and thus comes within the meaning of "seniority systems" for purposes of Section 703(h). Second, the alleged discriminatory effect of the 45-week provision results solely from the perpetuation of alleged prior discrimination. In and of itself, apart from its connection with the seniority system, it has no discriminatory effect. As the court below found, it prevents blacks and whites equally from advancing to the permanent classification. *Bryant, supra*, 585 F.2d at 424. Accordingly, if the 45-week provision and the seniority system of which it is a part otherwise meet the *bona fides* requirements of *Teamsters*, then no violation would have been shown. Thus, a remand would appear appropriate for that determination.<sup>24</sup>

#### IV. CONCLUSION

*Amicus* respectfully urges the Court to reject the approach adopted by the Ninth Circuit below to the determination of what constitutes a "seniority sys-

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that it would be unlawful, since the job-relatedness and business-necessity defenses under *Griggs* would still be available.

<sup>24</sup> If the standard proposed here is adopted, the lower courts should be cautioned not to use the suggested analysis of disparate impact as a back door out of Section 703(h) and into *Griggs*. Only in rare cases will a seniority system involve disparate impact that is caused other than by a perpetuation of some past practice.



tem" under Section 703(h) of Title VII. As shown, the lower court's approach conflicts fundamentally both with our national labor policy to afford broad freedom to the collective bargaining process and with the policy of Title VII to protect the seniority expectations of incumbent employees. It does so by impermissibly excluding seniority administration rules from the definition of seniority systems, by dictating that seniority systems must operate in a very particular way, and by failing to distinguish between disparate impact caused merely by perpetuation of past discrimination and that caused otherwise.

As an alternative, *Amicus* has suggested to the Court an approach respecting the policies underlying the collective bargaining process as well as the broad remedial goals of Title VII. We respectfully urge the Court to adopt that approach.

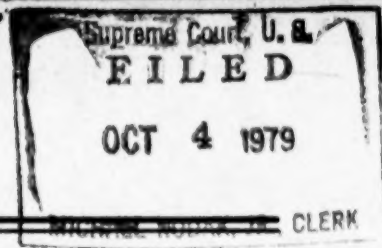
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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1979**

**No. 78-1548**

**CALIFORNIA BREWERS ASSOCIATION, et al.,**  
*Petitioners,*

v.

**ABRAM BRYANT,**  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTEREST OF <i>Amicus Curiae</i> .....	1
II. PRELIMINARY STATEMENT .....	4
1. Prior Proceedings.....	4
2. Statement of Facts .....	7
3. Summary of Argument .....	10
III. ARGUMENT:	
THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ALLEGATIONS OF EMPLOYMENT DIS- CRIMINATION FLOWING FROM THE 45 WEEK REQUIREMENT WERE NOT SUBJECT TO DISMISSAL BY THE MERE ASSERTION OF THE "SENIORITY" DEFENSE UNDER SECTION 703(h).....	12
1. Nature and Reach of Title VII Suits .....	12
2. Scope of Seniority Exemption Under Sec- tion 703(h).....	13
3. Considerations of Statutory Interpretation ..	17
4. The 45 Week Requirement.....	20
IV. CONCLUSION .....	25



## TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Aeronautical Industrial District Lodge 727 v. Campbell</i> , 337 U.S. 521 (1949).....	18
<i>Alabama Power Co. v. Davis</i> , 431 U.S. 581 (1977).....	19
<i>Brennan v. Keyser</i> , 507 F.2d 472 (9th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).....	18
<i>Cotton v. Hinton</i> , 559 F.2d 1326 (5th Cir. 1977).....	22
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974).....	3, 9
<i>Equal Employment Opportunity Commission v. Louisville &amp; Nashville Railroad Company</i> , 505 F.2d 610 (5th Cir. 1974), cert. denied, 423 U.S. 824 (1975).....	18
<i>Fishgold v. Sullivan Drydock &amp; Repair Corp.</i> , 328 U.S. 275 (1946).....	20
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953).....	18
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976).....	12
<i>Griggs v. Duke Power Company</i> , 401 U.S. 424 (1971) ..	12, 13
<i>Hernandez v. European Auto Collision, Inc.</i> , 487 F.2d 378 (2d Cir. 1973).....	9
<i>Humphrey v. Moore</i> , 375 U.S. 335 (1964).....	25
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	passim
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	12
<i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136 (1977).....	15
<i>National Automatic Laundry and Cleaning Council v. Shultz</i> , 443 F.2d 689 (D.C. Cir. 1971).....	18
<i>Parson v. Kaiser Aluminum &amp; Chemical Corp.</i> , 575 F.2d 1374, on rehearing, 583 F.2d 132 (5th Cir. 1978), cert. denied, 47 U.S.L.W. 3761 (May 21, 1979).....	16
<i>Patterson v. American Tobacco Co.</i> , 586 F.2d 300 (4th Cir. 1978).....	16
<i>Pettway v. American Cast Iron Pipe Co.</i> , 576 F.2d 1157 (5th Cir. 1978), cert. denied, 99 S. Ct. 1020 (1979) ...	17
<i>Phillips Company v. Walling</i> , 324 U.S. 490 (1944).....	18

	<u>Page</u>
<i>Powell, v. U.S. Cartridge Company</i> , 339 U.S. 497 (1950).....	18
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978).....	3
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	9
<i>Tcherepnin v. Knight</i> , 389 U.S. 332 (1967).....	17
<i>United Steelworkers of America v. Weber</i> , 99 S. Ct. 2721 (1979).....	3
<b>Statutes</b>	
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e..	passim
Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(2).....	18
Veterans Re-employment Rights Act of 1940, 50 U.S.C. App. § 459.....	18, 19, 20
<b>Rules</b>	
Federal Rules of Civil Procedure, Rule 12(b)(6).....	5, 9
U.S. Supreme Court Rule 42(2).....	1
<b>Miscellany</b>	
Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights", 75 Harv. L. Rev. 1532 (1962).....	23
Bureau of Labor Statistics, United States Department of Labor, "Collective Bargaining Provisions: Administration of Seniority", Bulletin No. 1425-14 at 11 n.9 (1972).....	22
Cooper & Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv. L.R. 1598 (1969).....	23
2A Moore's <i>Federal Practice</i> , ¶ 12.08 (2d ed. 1979).....	9
5A Moore's <i>Federal Practice</i> , ¶ 52.04 (2d ed. 1979).....	6
5 Wright & Miller, <i>Federal Practice and Procedure: Civil</i> : § 1357 (1969).....	21

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1979

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No. 78-1548

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CALIFORNIA BREWERS ASSOCIATION, et al.,  
*Petitioners,*

v.

ABRAM BRYANT,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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**BRIEF *AMICUS CURIAE* OF THE LAWYERS'  
COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

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**I. INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to

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<sup>1</sup> The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, several past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Our extensive litigation program against employment discrimination is conducted through our privately funded Government Employment Project (providing representation to federal, state, and local government employees claiming unlawful employment discrimination), through our Equal Employment Opportunity Project (which provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi and Washington offices and other local affiliates.

In this case, the Court must review the provisions of a statewide collective bargaining agreement in the brewery industry which, under the guise of "seniority," has effectively locked out of permanent employment positions blacks and other minority workers. If the challenge mounted by the petitioners to the decision of the Ninth Circuit is successful, the seniority exception embodied in § 703(h) of the Civil Rights Act of 1964, as amended, will become an insurmountable obstacle to a substantial proportion of otherwise worthy Title VII claimants. We believe that such a result was neither intended by Congress nor envisioned by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (hereafter, "*Teamsters*"), on which petitioners principally rely.

We have previously addressed issues of racial discrimination in the context of higher education as well as employment in our *amicus* briefs filed in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *United Steelworkers of America v. Weber*, 99 S.Ct. 2721 (1979). Because the issues presented by this case are vitally important to the realization of the goal of equal employment opportunity for blacks, the Committee files this brief urging affirmance of the judgment below.



## II. PRELIMINARY STATEMENT

### 1. Prior Proceedings

This uncertified class action was begun in October, 1973, in the United States District Court for the Northern District of California, by respondent, Abram Bryant, against petitioners, the California Brewers Association; the Falstaff Brewing Corporation, an individual brewery where Bryant had worked; the Teamster Brewery and Soft Drink Workers Joint Board of California ("Joint Board") of the International Brotherhood of Teamsters, etc. ("Teamsters"); and two Teamsters local unions, seeking relief pursuant to, *inter alia*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (sometimes referred to hereafter as "Title VII") to remedy alleged discriminatory employment practices in the brewery industry in California. Bryant alleged in his Second Amended Complaint (A. 9-24)<sup>2</sup> that he had worked in the brewery industry in California since 1968; had become a "temporary employee" therein; had sought unsuccessfully to become a "permanent employee," which status would have assured respondent important benefits and promotions; but had been thwarted in that endeavor by the concerted, illegal and discriminatory conduct of petitioners. (Second Amended Complaint, ¶¶ 12-22a, A. 16-18.) Respondent alleged that the acts of racial discrimination which had barred his entry into "permanent employee" status resulted inexorably from a collective bargaining agreement, dated June 1, 1970, entered into by, among others, the Teamsters Joint Board and the California Brewers Association ("Collective Bargaining Agreement"). (A. 25-42.) Specifically, Bryant pointed to § 4(a)(1) of the Collective Bargaining Agreement, which provided in 1970 (as it had for two decades past) that for a "temporary" employee to achieve "permanent" status, he had to work a minimum of 45 weeks in any year for a member brewery ("the 45 week

<sup>2</sup> References to the Appendix will be indicated by the letter "A" followed by relevant page citations.

requirement"). (A. 27.) Bryant alleged that, as a practical matter, the 45 week requirement had operated and would continue to operate in the brewery industry as a barrier to any worker's rise from the "temporary" to the "permanent" classification. He also alleged that virtually no black workers had achieved the status of "permanent employee." (Second Amended Complaint, § 16, A. 17.) He sought as relief (1) a declaratory and injunctive order enjoining the enforcement of the 45 week requirement; (2) a mandatory injunction awarding him unspecified retroactive status and benefits; and (3) damages.

Following procedural developments not material to this appeal, petitioners moved pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for an order dismissing the Second Amended Complaint on the ground that it failed to state a claim for which relief could be granted. That motion was granted, without opinion, and an order of dismissal entered on October 17, 1974. (A. 43-45.) The record does not reflect the grounds urged by the petitioners or the reasons underlying the decision of the District Court. It may be inferred from its summary disposition of the case, however, that the District Court reached its ultimate judgment without referring to any matters other than the Second Amended Complaint and the Collective Bargaining Agreement.

Respondent's appeal to the Court of Appeals for the Ninth Circuit thus tested solely the adequacy of the stricken pleading, not the quality or sufficiency of the evidence that respondent might marshal at a trial. It is necessary to stress this elementary procedural observation inasmuch as petitioners' argument to this Court occasionally reads as if respondent had been given an opportunity below to develop the record fully. (Brewers Br. at 6-12, 20-22.)<sup>3</sup> Following initial oral argument

<sup>3</sup> References to the Brief of Petitioners California Brewers Association and California Breweries will be indicated by "Brewers Br." followed by relevant page citations. References to the joint brief by the unions and to the *amicus* brief submitted by the Equal Employment Advisory Council will be indicated by "Union Br." and "EEAC Br.," respectively, followed by the relevant page citations.

before the Court of Appeals, *Teamsters* was decided, the proper interpretation of which has become the centerpiece of this case. *Teamsters* clarified the scope of the defense to Title VII suits found in § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). That section provides:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Interpreting this provision, the Court held, 431 U.S. at 353-54, that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."

The Court of Appeals below, in an opinion reported at 585 F.2d 421 (1979), reversed the dismissal of the Second Amended Complaint, concluding that respondent had pleaded facts sufficient to entitle him to a trial of his employment discrimination claims. In so concluding, the Ninth Circuit rejected petitioners' defense—reshaped in light of *Teamsters*—that the 45 week requirement was part of a *bona fide* seniority system immunized from review by § 703(h). That conclusion was mandated by its analysis of the terms and provisions of the Collective Bargaining Agreement.<sup>4</sup> The Court

<sup>4</sup> Notwithstanding the petitioners' contention that the Ninth Circuit engaged in impermissible appellate fact finding (Brewer's Br. at 42-45), the Court of Appeals did no more than summarize the allegations and uncontroverted documentary evidence before it. Indeed, where the District Court does not weigh the credibility or demeanor of live witnesses, the Court of Appeals is in as good a position as the District Court to summarize and evaluate the evidence. 5A Moore's *Federal Practice*, ¶ 52.04 at 2677 (2d ed. 1979), and cases collected therein. Moreover, the Ninth Circuit remanded to the District Court the task of determining the operative effect of the Collective Bargaining Agreement. 585 F.2d at 428.

of Appeals reasoned, first, that the 45 week requirement did not "involve an increase in employment rights or benefits based upon length of the employee's *accumulated* service." (emphasis added) 585 F.2d at 426. Second, it construed the provision as an "all-or-nothing proposition." 585 F.2d at 427. Third, the Court noted that credit for time worked was not cumulative from year to year. Because the 45 week requirement operated in this fashion, it could not lawfully be characterized as a seniority requirement or as part of a seniority system. Having concluded that the challenged provision of the Collective Bargaining Agreement was thus not free from judicial scrutiny by reason of § 703(h), the Court of Appeals remanded the cause "to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, . . . ." 585 F.2d at 428.

The petition for certiorari was granted on June 4, 1979. 47 U.S.L.W. 3781, 62 L. Ed. 2d 282.

## 2. Statement of Facts

The facts comprise the well-pleaded allegations of respondent's Second Amended Complaint, read in conjunction with the Collective Bargaining Agreement. As properly found by the Ninth Circuit, the following are the relevant factual allegations:

In 1968 plaintiff Abram Bryant, a Black person and a member of Teamsters' Local 856, got his first brewery worker's job with Falstaff Brewing Company in Northern California. Bryant earned his living working for Falstaff until 1973 when he went to work for Theodore Hamm Company. In 1974 when this action was filed, despite 6 years of brewery experience, Bryant was still classified as a temporary employee because of his inability to satisfy the 45-week provision in the collective bargaining agreement between all major California breweries and brewery unions. Under this provision, found in section 4 of the



agreement, a temporary employee must work 45 weeks in one calendar year before he is classified as permanent and entitled to additional fringe benefits and greater job security. On its face the requirement appears innocuous. The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year. [Footnotes omitted.] 585 F.2d at 423-424.

The specific provisions of the Collective Bargaining Agreement that precluded Bryant and others similarly situated from entering the ranks of "permanent employees," while simultaneously insulating those white workers who had achieved the highest employment status in the brewery industry from being divested of their status, are contained in §§ 4(a)(1) and 4(a)(5) thereof. Section 4(a)(1) provides in pertinent part that a temporary employee becomes a permanent employee when he "has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in [California]." Section 4(a)(5) provides that a permanent employee shall lose his status as such where, subject to exceptions not here relevant, he "is not employed under this Agreement for any *consecutive period* of two (2) years . . . ." (emphasis supplied) (A. 29.) It is not disputed that the latter provision means that divestiture of permanent employee status under Section 4(a)(5) occurs only where an employee fails to work at all in the brewery industry for a two-year period.

The balance of the Collective Bargaining Agreement, discussed at length by petitioners, addresses other distinct rights, benefits and obligations of the employees covered thereunder. (Brewers Br. at 8-12.) It is respectfully suggested that these provisions, which pertain to dispatching and job referrals, layoffs and bumping rights, reflect traditional notions

of seniority, in that rights accrue gradually and proportionately with the passage of time. These "true seniority" provisions, as the Ninth Circuit developed that concept, 585 F.2d at 426-427, are functionally distinct and severable from the status-defining provisions of §§ 4(a)(1) and 4(a)(5) described above.

In sum, focusing solely on the challenged provisions of the Collective Bargaining Agreement and the practices of the petitioners thereunder, respondent alleged that he and other black employees have been "forever precluded from achieving permanent status." (¶16, Second Amended Complaint, A. 17.)

Although petitioners maintain that the Court of Appeals attached undue weight to Bryant's allegations (Brewers Br. at 43-46), the foregoing summary of the facts must be assumed to be accurate and complete for purposes of this appeal.<sup>5</sup> Bryant's complaint thus alleged serious and pervasive patterns of racially discriminatory practices in a state-wide industry.<sup>6</sup> This appeal

<sup>5</sup> Indeed, the only additional fact that should be considered by the Court is the concession by petitioners that numerous member breweries in the California Brewers Association are now closed or are operating under agreements different from the Collective Bargaining Agreement under review here. (Brewers Br. at 6-7, n.7.) Since equitable relief against such defendants may be impossible to effectuate, the altered relationship of the parties may render this case moot. *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973), (in Civil Rights Act case where claim for specific relief became moot, remaining claim for nominal damages will not preserve suit); and *De Funis v. Odegaard*, 416 U.S. 312 (1974) (where injunction is no longer necessary to protect plaintiff's claimed entitlement to attendance at law school, case dismissed as moot).

<sup>6</sup> The standard which governs the dismissal of a complaint under Rule 12(b)(6) is that "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim" (emphasis omitted). 2A Moore's *Federal Practice* ¶ 12.08 at 2271, 2274 (2d ed. 1979). In the context of a civil rights case, the Court has similarly held that "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).



ultimately will determine whether he shall have an opportunity to prove his case in court; if not, respondent will have been thwarted by petitioners' conclusory assertion that the challenged provisions of the Collective Bargaining Agreement are free from judicial scrutiny because they may loosely be characterized as part of a seniority system established prior to the passage of the Civil Rights Act of 1964.

### 3. Summary of Argument

To determine whether Bryant is entitled to a hearing in the District Court of his claim that the 45 week requirement violates Title VII, the Court will have to determine the scope of the seniority exemption carved out of the Civil Rights Act by § 703(h). A number of decisions by this Court establish that in order to make out a *prima facie* case under Title VII, a plaintiff who challenges a facially neutral provision in an employment agreement that was adopted without impermissible racial motivation must show that the provision has had markedly disparate effects on white and nonwhite employees and cannot be justified by business necessity.

*Teamsters* decided that § 703(h) exempts from review employment practices to the extent that they are components of *bona fide* seniority systems established prior to the enactment of the Civil Rights Act of 1964, notwithstanding that they may perpetuate pre-Act unequal treatment of whites and nonwhites. Although the Court in *Teamsters* carefully circumscribed the requirement that a challenged practice be *bona fide*, it did not directly address the question of what constitutes a seniority system. Petitioners argue, in essence, that provisions of labor agreements pertaining to hiring, promotion, bumping and firing are part of a seamless web permeated by the concept of seniority. Accordingly, they urge that courts should not attempt to dissect such agreements in an effort to eliminate perceived discriminatory provisions, since any such judicial effort will necessarily upset a carefully negotiated system of rights and obligations agreed to over years by management and

labor. However, despite these predictions of dire consequences, federal courts in the wake of *Teamsters* have succeeded in isolating and enjoining parts of collective bargaining agreements that are violative of Title VII. Hence, it would appear that the task of analyzing such agreements and framing appropriate equitable decrees that remedy civil rights violations but respect and preserve other racially-neutral provisions is not beyond the capacity of the federal courts.

Moreover, a careful analysis of the case law shows that it is possible to extract certain core concepts that give meaning to the statutory term "seniority." The emphasis placed by the Ninth Circuit in its decision below on graduated increases in employment rights or benefits based upon the length of an employee's accumulated service was fully warranted. The court's construction is the more compelling when it is recognized that seniority is an *exception* to a statute whose overriding purpose is the extension, to all covered workers, of equal employment opportunities. A strict interpretation of "seniority" in § 703(h) thus comports with the basic scheme of Title VII.

Measured against these standards, the 45 week requirement cannot escape judicial scrutiny. Its principal characteristics are those alleged by Bryant and identified by the Ninth Circuit: (i) forfeiture of time accrued after each calendar year; (ii) the impossibility of satisfying the criterion; and (iii) the failure of the Collective Bargaining Agreement to confer any intermediate right or benefit short of permanent status on a temporary employee who works a substantial number of weeks — but fewer than 45. In view of these deficiencies, the Court of Appeals properly reinstated the Second Amended Complaint so as to permit Bryant to attempt to prove his allegations of discriminatory practices in the brewery industry in California.

### III. ARGUMENT

**THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ALLEGATIONS OF EMPLOYMENT DISCRIMINATION FLOWING FROM THE 45 WEEK REQUIREMENT WERE NOT SUBJECT TO DISMISSAL BY THE MERE ASSERTION OF THE "SENIORITY" DEFENSE UNDER SECTION 703(h).**

#### 1. Nature and Reach of Title VII Suits

The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). In order to accomplish this goal, Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). Numerous decisions in this Court have demonstrated that a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group. *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *McDonnell Douglas Corp. v. Green*, *supra*, at 802 n.14; *Griggs, supra*, at 430. Thus, a facially neutral practice which perpetuates the effects of prior discrimination generally violates Title VII.

As the Court held in *Griggs*: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. In *Griggs* the Court held that an employer's practice of requiring either a high school diploma or passing an intelligence test as a prerequisite to employment or transfer violated the Civil Rights Act of 1964. Neither requirement was shown to bear a "demonstrable relationship to successful performance of the jobs." 401 U.S. at 431. The Court

explained the overriding purpose of Title VII of the Civil Rights Act in these terms:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. 401 U.S. at 429-30.

Contrary to the central contention articulated by petitioners, who would read Title VII as part of a "Seniority Exemption Act of 1964," *Teamsters* carved out a narrow exception within the rule announced in *Griggs*. To accept the boundless definition of "seniority system" proffered by petitioners (Brewers Br. at 25-35, Union Br. at 21-32) would vitiate Title VII by requiring virtually every employment discrimination claimant to prove initially that the practice complained of was not remotely related to a seniority system. The limited immunity granted by § 703(h) should not be allowed to protect any and all elements of labor agreements which employers and unions characterize as components of seniority systems. (EEAC Br. at 30.) To do so would permit management and unions to dilute employees' civil rights by the simple expedient of labelling as a "seniority" requirement any challenged provision of a collective bargaining agreement. Such a result would encourage evasion of the Act's requirements and obstruct the important goals of Title VII. Nothing in *Teamsters* requires this result, as a close examination of its facts and rationale will demonstrate.

#### 2. Scope of Seniority Exemption Under § 703(h)

In *Teamsters*, black employees of a carrier company challenged certain seniority provisions in their union's collective bargaining agreements. The employees' union maintained two separate bargaining units which corresponded to the company's two departments — line drivers and city drivers. For purposes

of calculating "competitive seniority," *i.e.*, "the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff...", 431 U.S. at 343, seniority was based upon length of service in a particular *department*. For purposes of calculating "benefit seniority," *e.g.*, vacation time and pension credits, seniority was based upon length of service with the *company*. Employees seeking to transfer from one department into the other could not retain their accumulated "competitive seniority."

Black workers had traditionally been assigned only to the less desirable city driver department and claimed that the forfeiture of competitive seniority upon transfer unfairly discriminated against them and "locked" them into jobs. The Court held that the seniority system was protected by § 703(h), since "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.

The seniority system in *Teamsters* granted job seniority along historically separate job classifications in a manner which perpetuated the allocation of those jobs on racial lines. However, it did not bar employees' access to a different job, nor any non-employees' access to a particular job. In *Teamsters*, black workers could become line drivers after the Act was passed; in large measure they declined to seek such a transfer because to do so would have jeopardized their job security. The gist of *Teamsters* is that a *bona fide* seniority provision in a fairly negotiated collective bargaining agreement is not prohibited under Title VII of the Civil Rights Act of 1964, as amended, simply because it may not confer on present employees seeking transfer to a new department any greater rights than are enjoyed by non-employees.

In sum, *Teamsters* gave content to the requirement in § 703(h) that a seniority system, to be free from challenge in Title VII actions, must be *bona fide*. But *Teamsters* left to another day the question of the precise contours of seniority

systems as such. Thus, contrary to the contention of petitioners, Bryant's argument that he is entitled to an order striking down certain portions of the Collective Bargaining Agreement that are not part of the core seniority system in the California brewery industry is not foreclosed by *Teamsters*.

Results reached by post-*Teamsters* cases refute petitioners' proposition that § 703(h) protects all aspects of the employer-employee relationship that may be attributable to alleged seniority systems. The Court has recognized in a sex discrimination case that also arose under § 703(a)(2) the inherent limitations of § 703(h). In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court held that certain elements of a seniority system having a discriminatory impact upon women violated § 703(a)(2) of Title VII. The employer in *Satty* required pregnant female employees to take a leave of indeterminate length. The seniority system provided that such employees must forfeit any job security accrued prior to the leave. Thus, an employee who sought re-employment after a pregnancy leave could only obtain a position "for which no individual currently employed is bidding . . ." 434 U.S. at 139.

When the employee in *Satty* applied for reinstatement, she learned that her previous position had been eliminated due to *bona fide* cutbacks in her department. Instead, she received a job in a temporary capacity. Her repeated attempts to secure a permanent position were rejected in favor of other employees who had begun to work during her pregnancy leave. The Court stated that "both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)." 434 U.S. at 141. The employment practice which denied accumulated seniority to female employees was found to be facially neutral but could not be sustained due to its discriminatory effect upon women's employment opportunities. *Id.* at 143. The Court thus gave tacit recognition to the fact that particular sections of collective bargaining agreements may be nullified on Title VII grounds notwithstanding their loose relationship to core seniority provisions of such agreements.



Post-*Teamsters* cases in the lower federal courts demonstrate that *Teamsters* does not authorize unwarranted expansion of the scope of the term "seniority system." Employers have not been permitted to dilute employees' civil rights by incorporating extrinsic practices into the definition of "seniority" systems.

In *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, on rehearing, 583 F.2d 132 (5th Cir. 1978), cert. denied, 47 U.S.L.W. 3761 (May 21, 1979), for example, the court held that a restrictive provision governing interdepartmental transfer opportunities was not part of the seniority system. An employee seeking to transfer to a new department could bid for an entry level job only in that department. Upon transferring he was required to retain the entry level job for a minimum of ten days before becoming eligible to bid for vacancies in the new department. In striking down this system, which inhibited interdepartmental transfers, the court stated:

While the rules for bidding for vacancies within a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon transfer wholly extraneous to the prevailing seniority system, and, as such, is not immunized by § 703(h) and *Teamsters*. 583 F.2d at 133.

The *Parson* decision illustrates the need to draw careful distinctions between various aspects of employment. Although rules of promotion and tenure may have some of the attributes of seniority, that fact alone does not remove a system of promotion and tenure from judicial scrutiny.

In *Patterson v. American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978), the court held that a "promotional system" with a racially discriminatory impact was not part of a seniority system and consequently not immunized by § 703(h). The "promotional scheme" provided that certain jobs be filled according to

lines of progression, with employees moving from one job to the next within the line. The available jobs were predominantly in one department from which blacks had traditionally been excluded. Thus, blacks held few jobs in these lines and could not advance up the scale of progression despite their seniority. The Court of Appeals held that the lines of progression were not components of the seniority system:

As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly linked to 'a bona fide seniority system.' Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments. Only our decision to allow black employees to make interbranch transfers with the retention of company seniority impinges upon American's seniority system. (Emphasis added.) 586 F.2d at 303.

See also, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-4 (5th Cir. 1978), cert. denied, 99 S.Ct 1020 (1979), which held that a line of progression did not constitute part of a seniority system.

### 3. Considerations of Statutory Interpretation

It is a well-established principle of statutory construction that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332,

336 (1967).<sup>7</sup> Petitioners' interpretation of the statutory exception set forth in § 703(h) effectively undermines the remedial purposes of Title VII.

Moreover, statutory exceptions to remedial laws should be read narrowly.<sup>8</sup> Thus, in *Phillips Company v. Walling*, 324 U.S. 490 (1945), the Court read restrictively a statutory exemption contained in § 13(a)(2) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(2). The Court stated that:

The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work' . . . . Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people. 324 U.S. at 493.

In construing the term "seniority," petitioners rely heavily upon a line of cases decided under the Veterans Re-employment Rights Act of 1940, as amended, 50 U.S.C. App. § 459 ("Veterans Act").<sup>9</sup> The Veterans Act provides that a veteran who seeks re-employment after discharge from military service "shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes." 50 U.S.C. App. § 459(g)(4). The broad language employed in these decisions should not be taken out of context.

<sup>7</sup> See also, *Powell v. U.S. Cartridge Company*, 339 U.S. 497, 516-17 (1950); *Equal Employment Opportunity Commission v. Louisville & Nashville Railroad Company*, 505 F.2d 610, 616 (5th Cir. 1974), cert. denied, 423 U.S. 824 (1975).

<sup>8</sup> *Brennan v. Keyser*, 507 F.2d 472, 477 (9th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971).

<sup>9</sup> E.g., *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). See, *Brewers Br.* at 28-32; *Union Br.* at 23-27.

The Veterans Act was, in essence, a civil rights act for returning veterans. The purpose of the Veterans Act was to assure that individuals who engaged in military service would not be penalized upon their return to civilian life. Because the courts sought to protect the rights of returning veterans they construed terms and conditions of employment, including "seniority," broadly so as to effectuate the statutory objective. But it must be borne in mind that in the Veterans Act suits, the rights of the returning serviceman — including rights to "super-seniority" — were grounded in a Congressional declaration of policy to accord enlarged benefits to veterans. Those who opposed the veterans' claims generally defended on contractual, not statutory grounds. Their arguably cramped construction of "seniority" provisions in labor-management agreements generally yielded to the specific statutory purpose of protecting returning servicemen from loss of rights occasioned by their departure from the civilian job force. Moreover, the cases relied on by petitioners simply do not arise in contexts where claims of seniority had to be weighed against competing civil rights claims of black workers protected by Title VII.

An analysis of one representative case, *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), illustrates the rationale behind this group of cases. Davis' employment at Alabama Power Company, interrupted by 30 months of military service, continued until his retirement. He claimed that § 9 of the Veterans Act, 50 U.S.C. App. § 459(b), required his employer to give him pension credit for his period of military service. § 9 provides in part that a veteran seeking re-employment shall "be restored...to a position of like seniority, status, and pay...." 50 U.S.C. App. § 459(b)(B)(i).

The Court focused on the nature of the benefits involved and concluded, contrary to the Power Company's assertion, that pension payments were part of the seniority system. The company could not avoid granting veterans the protection afforded by the Act by characterizing pension payments as deferred compensation for actual service rendered. The Court

held, citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), that "no practice of employers...can cut down the service adjustment benefits which Congress has secured the veteran under the Act." Thus, defining seniority rights in a liberal fashion best implemented the purpose of the Veterans Act.

The instant case, however, arises under the Civil Rights Act, not the Veterans Act. Although both Acts are remedial, the purpose and scope of each is fundamentally different. We do not understand petitioners to suggest that the drafters of § 703(h) of the Civil Rights Act looked to the treatment of seniority under the Veterans Act to give meaning to the statutory phrase "*bona fide* seniority...system." Nor does our research disclose any nexus between the two acts. Accordingly, cases decided under the Veterans Act ultimately offer little guidance in determining the scope of the seniority exemption under Title VII.

#### 4. The 45 Week Requirement

As *amicus*, we are of course cognizant of the sanctity of collective bargaining agreements. No one denies that freedom of collective bargaining must be respected; but proper observance of that principle should not foreclose examination of particular provisions in labor-management agreements said to relate to seniority systems.

Section 4(a)(1) of the Collective Bargaining Agreement defines a "permanent employee" as one who "has completed forty-five weeks of employment under this agreement . . . in one calendar year." (A. 27.) The Court of Appeals correctly determined that this provision neither comprises a seniority system nor is it part of a seniority system.<sup>10</sup> 585 F.2d at 426.

<sup>10</sup> In further support of their contention that the 45 week requirement is a seniority rule or an element of a seniority system, petitioners point to respondent's "admissions" below to that effect. (Brewers Br. at 41 n.18.) Although Bryant undeniably alleged that the contested provision was part and parcel of petitioners' seniority

[footnote continued on following page]

The sole function of the 45 week requirement is to enable the companies and the union to classify brewery workers as permanent or temporary employees. Since temporary employees are distinguishable from permanent employees only by virtue of their failure to have satisfied the 45 week minimum within one year, it is clear that the distinction between the two classes of employees is arbitrary and, unlike *Teamsters*, unrelated to a *bona fide* seniority system. The capricious aspects of the distinction are easily illustrated.

Seniority systems are intended to encourage attendance, diligence and attention to daily responsibilities because every day an employee works, he acquires greater job security and competitive advantage. Unless the 45 week requirement is satisfied, notwithstanding longevity of service in any other respect, employees are denied crucial benefits, such as job security and bumping rights. As further evidence of the proposition that the 45 week requirement is not an aspect of seniority, we invite the Court to compare the *divesting* provisions of § 4(a)(5) of the Collective Bargaining Agreement with the *vesting* provision, § 4(a)(1), described immediately above. Section 4(a)(5) provides that permanent employees can lose their protected status only if they fail to work at all for two consecutive years. (A. 29.) Section 4(a)(5) does not require a minimum amount of work within these two years. Thus, the 45 week requirement is unrelated to the proper goals of a seniority system.

[footnote continued from prior page]

system (see, e.g., ¶ \*15, Second Amended Complaint, A. 16-17), this characterization is hardly an admission for purposes of a motion to dismiss a complaint at the pleadings stage. "[T]he court will not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what has happened, or if these allegations are contradicted by the description itself." 5 Wright & Miller, *Federal Practice and Procedure: Civil*: § 1357 at 597 (1969). Moreover, it can hardly be doubted that the issue of whether the 45 week requirement may properly be described as a seniority provision is a mixed question of fact and law, if indeed in the post-*Teamsters* era it is not a pure question of law. (Brewers Br. at 41.)



Petitioners concede (Brewers Br. at 28) the "general truth" of the statement by the Court of Appeals that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases" 585 F.2d at 426. However, petitioners attempt to retract that important concession by complaining that "the Ninth Circuit omitted any discussion of the important limitations and conditions that serve to define and qualify the operation of seniority." *Id.* The reason why the Court of Appeals did not discuss any special factors which could be included within a seniority system is that not one of these factors is present in the Collective Bargaining Agreement. Petitioners cite "superseniority" provisions and probationary requirements in other labor agreements as factors which frequently affect seniority based purely on length of service. (Brewers Br. at 26-28.) However, "superseniority" is irrelevant because it does not come into play in the brewery industry's Collective Bargaining Agreement. Also, the rules governing probation, to which petitioners refer, similarly have no bearing on the 45 week requirement. "Probationary employees are normally hired in the expectation that they will be retained as regular employees if their work proves satisfactory."<sup>11</sup> Satisfactory work in the brewery industry, however, does not correlate to advancement in status from temporary to permanent employee.

Moreover, the 45 week requirement cannot be justified on the basis of skill or special training or merit. Petitioners' discussion of the complexity of certain seniority systems obfuscates the fact that the 45 week requirement has no relation to either seniority or any other "important factor." For example, in *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977), a case cited by petitioners (Union Br. at 36 n.37), the Fifth Circuit per-

<sup>11</sup> Bureau of Labor Statistics, United States Department of Labor, "Collective Bargaining Provisions: Administration of Seniority," Bulletin No. 1425-14 at 11 n.9 (1972)

mitted certain critical jobs to be excepted from the plant-wide seniority system only because these jobs "necessitated special treatment in light of the higher responsibility required for the performance of such jobs." 559 F.2d at 1333. Such functional distinctions are not present in the brewery industry.

As noted above, the requirement that an employee work 45 weeks during one year in order to attain permanent status bears no relationship to the fundamental ingredient of all seniority systems—total length of service. "The variations and combinations of seniority principles are very great, *but in all cases the basic measure is length of service . . .*"<sup>12</sup> (emphasis added).

The 45 week requirement is not designed to reward employees on the basis of their cumulative employment record. Although temporary employees may gain in relative seniority within that category on the basis of length of service, such advancement will not lead to a change of status from temporary to permanent employee. Bryant alleged, and at this stage of the litigation it must be assumed to be true, that even the highest ranking temporary employee may be barred forever from attaining the security and benefits enjoyed by permanent employees. Assuming *arguendo* that the barrier is not impermeable, it would theoretically be possible for a low-ranking temporary employee to achieve permanent status by the quirk of working for 45 weeks in any single year, regardless of how little he may have worked in earlier years.

Although petitioners argue strenuously that the Court of Appeals slighted the seniority features of the Collective Bargaining Agreement, it should be clear from the foregoing analysis that such seniority features are distinct from and of no

<sup>12</sup> Cooper & Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv. L.R. 1598, 1602 (1969); *See also*, Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev. 1532, 1534 (1962).

benefit to the temporary employee seeking genuine job security within the ranks of permanent employees. This anomaly serves to underscore Bryant's contention that the 45 week requirement is so far removed from true seniority, as the term is commonly understood, that judicial inquiry into its allegedly discriminatory effects is entirely proper. In contrast to the situation in *Teamsters*, where the problem arose from a loss of job security upon transfer, here there is no realistic chance of obtaining a transfer with access to job security itself. In the brewery industry, unlike *Teamsters*, there is no functional difference between permanent and temporary employees. It is thus evident that the 45 week requirement cannot be considered rationally related to any element traditionally associated with seniority system. What is more, petitioners fail to show why an equitable decree could not be framed that would nullify §§ 4(a)(1) and 4(a)(5) of the Collective Bargaining Agreement while leaving intact the *bona fide* core seniority provisions that are not the subject of Bryant's challenge.

Even the cases on which petitioners principally rely (Brewers Br. at 29-31; Union Br. at 38-9, 47-50) acknowledge the central role of true seniority. In *Teamsters*, seniority was measured from the date an employee joined the company and from the time he entered a particular bargaining unit. This dual system of seniority established different orders of priority among employees for different purposes. However, within each area, seniority accrued with length of service. Plaintiffs there did not attack the measure used, which was based on length of service; instead, the challenge was to their inability to transfer seniority between bargaining units.

This Court made clear in *Teamsters* that Title VII does not require wholesale emasculatation of seniority systems so as to erase all indicia of pre-Civil Rights Act discrimination. But the statutory objective of equal employment opportunity cannot be circumvented by labelling as an element of "seniority" a discriminatory practice that disadvantages those intended to be

protected by Title VII. Bryant does not seek advancement on the basis of discriminatory practices antedating his employment in 1968 in the brewery industry. He asks only that this Court permit him to prove at trial that the 45 week requirement bears only the most attenuated relationship to commonly understood standards of seniority and should be invalidated because of its racially discriminatory effects during the period of his employment, unjustified by any business necessity. If the decision below is affirmed, respondent will endeavor to show that the 45 week requirement falls within the category of "capricious or arbitrary factors" condemned by this Court in *Humphrey v. Moore*, 375 U.S. 335, 350 (1964).

#### IV. CONCLUSION

As the foregoing analysis demonstrates, Title VII suits cannot be defeated by the bare assertion that the challenged employment practice is in some attenuated fashion related to a seniority system. Section 703(h) of the Civil Rights Act of 1964, as construed in *Teamsters*, should exempt from judicial review only those employment practices grounded in pre-1965 provisions of collective bargaining agreements that are unambiguously part of *bona fide* seniority systems. For Title VII purposes, a true seniority provision is one that entails graduated increases in employment rights or benefits based upon the length of an employee's accumulated service. Because (1) the 45 week requirement in the California brewery industry is not a true seniority provision and (2) petitioners have not conclusively shown that enjoining the enforcement of the 45 week requirement will vitiate other provisions of the subject Collective Bargaining Agreement that are exempt from review, the Court of Appeals correctly concluded that Bryant should be given a hearing in which to prove the racially discriminatory effects of the 45 week requirement. Accordingly, the judgment

of the Court of Appeals, reversing the dismissal of Bryant's Second Amended Complaint, should be affirmed.

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**No. 78-1548**

CALIFORNIA BREWERS ASSOCIATION, ET AL., *Petitioners,*

v.

ABRAM BRYANT, *Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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## INDEX

TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	7
I.    ATTAINMENT OF PERMANENT EMPLOYEE STATUS BASED ON OPERATION OF THE 45-WEEK RULE IS NOT A PERQUISITE OF SENIORITY AND IS THEREFORE NOT WITHIN THE SECTION 703(h) SENIORITY EXCEPTION.....	7
A. <u>The Sweeping Construction of the               Section 703(h) Seniority Excep-               tion Advocated By Petitioners               Would Inappropriately Undermine               Congress' Overriding Objective               Of Equal Employment Opportunity...</u>	7
1.    In Enacting Title VII Congress Legislated Broadly To Eradi- cate Practices Which Limit Minorities' Employment Oppor- tunities And Did Not Create A Sweeping Exception For Seni- ority Systems.....	10
2.    The Court of Appeals Decision Excluding Non-Seniority Cri- teria From The Reach of Sec- tion 703(h) Correctly Imple- ments Title VII's Remedial Purpose.....	22

B.	<u>Achievement Of Permanent Status Through Satisfaction Of The 45-Week Rule Is Not A Perquisite Of "Seniority" Either As That Term Is Understood In Everyday Parlance Or In The Scholarly Literature, Government Bulletins, And Decisions Of This Court Relied Upon By The Employer And Union Parties.....</u>	27
C.	<u>The Court Of Appeals Holding That Attainment Of Permanent Status Based On The 45-Week Rule Is Not A Seniority Perquisite Is Supported By Decisions Of This Court And Lower Federal Courts Distinguishing Between Seniority And Other Benefits....</u>	42
II.	THE PROPOSED SOLUTIONS OFFERED BY AMICI EQUAL EMPLOYMENT ADVISORY COUNSEL AND THE AFL-CIO, WHILE DISPLAYING GREATER SENSITIVITY TO TITLE VII'S GOALS THEN THE POSITIONS TAKEN BY PETITIONERS, ARE ALSO UNTENABLE.....	52
	CONCLUSION.....	57

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966).....	44,45,46,47,48
Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).....	3,7,38,39
Alabama Power Co. v. Davis, 431 U.S. 581 (1977).....	44,48
Alaniz v. Tillie Lewis Foods, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd 572 F.2d 657 (9th Cir. 1978), cert.denied 99 S.Ct. 123 (1978).....	2
Albemarle Paper Co. v. Moody, 431 U.S. 581 (1977).....	44,48
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).....	11
Alexander v. Machinists' Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977)...	26
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).....	12
Cox v. International Longshoremen's Ass'n., Local 1273, 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd. 476 F.2d 1287 (5th Cir. 1973), cert. denied 414 U.S. 1116..	49,50,51
Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), cert. denied 404 U.S. 950.....	12
Dothard v. Rawlinson, 433 U.S. 321 (1977).....	11,12



	<u>Page</u>
Eagar v. Magnia Copper Co., 389 U.S. 323 (1967).....	44
East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).....	2
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).....	44, 45
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).....	37, 39
Foster v. Dravo Corp., 420 U.S. 92 (1975).....	44, 47, 48
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).....	2, 11, 18, 23, 25, 43, 57
Griggs v. Duke Power Co., 401 U.S. 424 (1971).....	2, 6, 9, 10, 12, 23, 24, 52, 55, 57
International Brotherhood of Teamster v. United States, 431 U.S. 324 (1977).....	6, 9, [11, 19, 21, 25, 26]
Kinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265 (1958).....	44
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).....	11
Oakley v. Louisville & Nashville R. Co., 338 U.S. 278 (1949).....	44
Parson v. Kaiser Aluminum & Chemical Corp., 583 F.2d 132 (5th Cir. 1978).....	26
Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978), rehearing granted en banc (1979).....	26

	<u>Page</u>
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).....	12
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).....	13
Tilton v. Missouri Pacific R. Co., 376 U.S. 169 (1964).....	44
United Steelworkers of America v. Weber, ___ U.S. ___, 99 S.Ct. 2721 (1979).....	11, 13, 14
Watkins v. United Steelworkers of America, Local Union No. 2369, 516 F.2d 43 (5th Cir. 1975).....	17
Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).....	12
White v. Dallas Independent School District, 581 F.2d 556 (5th Cir. 1978) (en banc).....	2

# Statutes

Military Selective Service Act, 50 U.S.C. App. §§451 <u>et seq.</u> .....	43
Section 9, 50 U.S.C. App. §459.....	43, 50
Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e <u>et seq.</u> .....	passim
Sections 703(a)-(d), 42 U.S.C. §2000e-2(a)- (d) .....	11
Section 703(e), 42 U.S.C. §2000e-2(e)....	12
Section 703(h), 42 U.S.C. §2000e-2(h). passim	
Section 703(j), 42 U.S.C. §2000e-2(j)....	13
Section 704, 42 U.S.C. §2000e-3.....	11

Legislative Materials

H.R. 7152, 88th Cong., 1st Sess. (1963)...	15
110 Cong. Rec. 2727 (1964).....	16
110 Cong. Rec. 7207 (1964), U.S. Dept. of Justice Interpretive Memorandum.....	15
110 Cong. Rec. 7213 (1964), Clark-Case Memorandum.....	15,17
110 Cong. Rec. 7217 (1964), Clark-Dirksen Responses.....	15
110 Cong. Rec. 12,723 (1964).....	15
110 Cong. Rec. 12,813 (1964).....	15
110 Cong. Rec. 12,818 (1964).....	15
110 Cong. Rec. 15,896 (1964).....	15
110 Cong. Rec. 16,002 (1964).....	15

Other Authorities

Aaron, <u>Reflections on the Legal Nature and Enforceability of Seniority Rights</u> , 75 HARV. L. REV. 1532 (1962).....	30
Cooper & Sobol, <u>Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion</u> , 82 HARV. L. REV. 1598 (1969).....	31
Slichter, Healey & Livernash, <u>The Impact of Collective Bargaining on Management</u> (1960).....	31

United States Dept. of Labor Bulletins:

Bulletin No. 908-11, "Collective Bargaining Provisions - Seniority" (1949).....	36,39
Bulletin No. 1425-11, "Seniority in Promotion and Transfer Provisions" (1970).....	25,33,34,35,36
Bulletin No. 1425-14, "Administra- tion of Seniority" (1972).....	36,37

IN THE  
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On Writ of Certiorari to the  
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BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC., AND MEXICAN  
AMERICAN LEGAL DEFENSE AND EDUCATIONAL  
FUND, INC.

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INTEREST OF AMICI CURIAE

Amicus Curiae NAACP Legal Defense and  
Educational Fund, Inc., is a non-profit  
corporation, incorporated under the laws of  
the State of New York in 1939. It was  
formed to assist black Americans to secure



their constitutional and civil rights by the prosecution of legal actions. The NAACP Legal Defense and Educational Fund is independent of other organizations and is supported by public contributions. For many years its attorneys have represented parties in this Court and lower courts in cases involving claims of employment discrimination under Title VII of the Civil Rights Act of 1964, including Griggs v. Duke Power Co., 401 U.S. 424 (1971), Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and many others.

The Mexican American Legal Defense and Educational Fund, Inc., was founded in 1968 as a non-profit corporation under the laws of the State of Texas and is headquartered in San Francisco, California. Its principal purpose is to secure the civil rights of persons of Mexican descent through litigation and education. It has handled many lawsuits involving employment discrimination in this Court and lower courts, including East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), White v. Dallas Independent School District, 581 F.2d 556 (5th Cir. 1978) (en banc), Alaniz v. Tillie Lewis Foods, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd 572

F.2d 657 (9th Cir. 1978), cert. denied 99 S. Ct. 123 (1978), and many others.

Both Amici Curiae have extensive knowledge of the myriad work rules and seniority arrangements which continue to function to keep blacks and Mexican Americans at the bottom of the ladder of employment opportunities. Both are representing blacks and Mexican Americans in pending lawsuits whose outcome may be affected by the case at bar. Both are therefore concerned to advise this Court of the broad ramifications of the issue presented in this case and its importance for the economic future of the Nation's two largest minority groups.

This brief is filed with consent of all the original parties to the litigation; consent letters are on file.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The collective bargaining agreement governing employment in the California brewing industry defines a "permanent employee" as "any employee...who...has completed forty-five weeks of employment under this Agreement...in one calendar year as an employee of the brewing industry in this State..." (A. 27). Individuals who have not worked forty-five weeks in any calendar year are

classified as "temporary employees" (A. 28). Insofar as "permanent" and "temporary" employees are concerned, the agreement establishes two separate seniority systems, one for each group. Under the agreement, permanent employees enjoy greater fringe benefits than temporary employees and are preferred over temporary employees in connection with job acquisition and retention. See, A.29-A.38.

The Court of Appeals observed that no black person has ever attained permanent employment status in the brewing industry in California (Pet. A. 3, 585 F.2d at 424). Because of the lessened demand for labor in recent years, it has become nearly impossible for any temporary employee, regardless of race, to work forty-five weeks in a single calendar year. Accordingly, as observed by the Ninth Circuit, the forty-five week requirement "...in effect preserves an all white class of permanent brewery employees..." (Pet. A. 2, 585 F.2d at 423). Although Plaintiff Bryant has earned his living as a brewery worker since 1968, he remains a "temporary employee," id.

The Court of Appeals correctly held that achievement of permanent employee status based on satisfaction of the 45-week

provision is not a perquisite of seniority, thus it is not within the exception to ordinary standards of liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., provided for a "bona fide seniority system" by §703(h) of that Act, 42 U.S.C. §2000e-2(h). Instead, the Court held the 45-week provision governed by the normal Title VII rule under which employment policies and practices neutral on their face and in intent are nevertheless illegal if found to have discriminatory effects (Pet. A. 12, 585 F.2d at 427).

The agreement in this case sets forth a system of preferences governing acquisition and retention of jobs. While in American industry some agreements accord preference solely on the basis of seniority, the great majority--like that in this case--determine such preferences based on combined operation of seniority and nonseniority criteria. A proper application of the Section 703(h) seniority exception must proceed from this recognition and must refrain from extending the exception to nonseniority criteria which commonly operate in combination with seniority factors in an overall job preference scheme.

The Petitioners<sup>1</sup> advocate a broad reading of "seniority" which would extend the Section 703(h) exception recognized in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), to the overall operation of a collectively-bargained preference scheme and preclude application of the normal rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971), to separate nonseniority component criteria. As set forth below, this approach would inappropriately allow the §703(h) seniority exception to swallow up Title VII's generalized prohibitions (Part I-A, infra). It rests on a concept of seniority inconsistent with that prevailing in common parlance and industrial usage (Part I-B, infra). Indeed, it rests on a concept of seniority far broader than that articulated in suits addressing the rights of reemployed veterans where protection of seniority rights is the rule compelling a broad construction rather than an exception to a broad remedial statute (Part I-C, infra). The views of Amici Equal Employment Advisory

<sup>1</sup>The employer and union parties seeking reversal of the Court of Appeals' decision are referred to throughout collectively as Petitioners even though the unions are technically Respondents, not having petitioned this Court for review.

Council and the AFL-CIO recognize the pitfalls of Petitioners' contention that §703(h) should be applied to protect the overall operation of a collectively-bargained preference system; those Amici too, however, advocate a concept of seniority far broader than that prevailing in common and industrial usage and articulated by federal decisions distinguishing seniority from other criteria (Part II, infra).

#### ARGUMENT

I. ATTAINMENT OF PERMANENT EMPLOYEE STATUS BASED ON OPERATION OF THE 45-WEEK RULE IS NOT A PERQUISITE OF SENIORITY AND IS THEREFORE NOT WITHIN THE SECTION 703(h) SENIORITY EXCEPTION.

A. The Sweeping Construction Of The Section 703(h) Seniority Exception Advocated By Petitioners Would Inappropriately Undermine Congress' Overriding Objective Of Equal Employment Opportunity.

Petitioners contend that the Court of Appeals erred by separately scrutinizing operation of the 45-week rule apart from the overall collectively-bargained system of employee priority. To this end, they seek a sweeping construction of the §703(h) exception under which a priority system--even one combining seniority and nonseniority



criteria--would be protected as an integrated whole. Separate application of normal adverse impact principles to individual non-seniority components of the system would necessarily be barred. While this position is heavily grounded in asserted rights of freedom of collective bargaining under general national labor policy, it totally loses sight of Congress' declared objective in Title VII of rooting out discrimination in employment. Petitioners' briefs are revealingly lacking even in lip-service to Title VII's overriding objective. To the contrary, they suggest time and again that protection of seniority and unfettered bargaining rather than the elimination of discrimination and achievement of equal opportunity were Congress' foremost concerns. Their approach to §703(h) is oblivious to the established principle under which exceptions to remedial statutes are narrowly construed, which has up to now been uniformly followed by this and other federal courts. If adopted it would anomalously single out the §703(h) seniority exception for sweeping construction and allow it to swallow up the general principles heretofore held to govern.

The Court's decision in this case will neither fully insulate nor completely

prohibit any use of seniority, or any set of work rules. The Court's decision in this case may determine which of two standards will govern adjudication of challenges to a variety of work rules under Title VII. On one hand, the test of Griggs v. Duke Power Co., 401 U.S. 424 (1971), condemns a wide range of rules which adversely affect a protected minority group and are non job-related or required by business necessity; on the other, the much more limited prohibition of seniority systems which are shown to be non-bona fide, as developed in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), exempts certain "seniority systems" from review under the Griggs standard. Whatever the outcome here, a rule which does not have adverse effect on a protected minority or which is necessary for legitimate business reasons will remain intact. A practice which is not bona fide, and which discriminates, will remain subject to modification even though it is a "seniority system" within the meaning of §703(h) of Title VII. In short, in this case the Court is asked to formulate a decisional rule, not to legislate with respect to preferred or allowable forms of industrial organization.

Since the issue is to formulate a decisional rule based on statutory language, it is especially important that the Court heed the canon of construction that provisions which limit the effectiveness of remedial legislation should be narrowly construed.<sup>2</sup> For the question is how to read the statute when deciding cases, and the answer must look to the purpose of the Congressional enactment as its guiding principle.

1. In Enacting Title VII Congress Legislated Broadly To Eradicate Practices Which Limit Minorities' Employment Opportunities And Did Not Create A Sweeping Exception For Seniority Systems.

While Petitioners ignore Congress' overriding objective in enacting Title VII, this Court has recognized it time and again. In Griggs v. Duke Power Co., supra, 401 U.S. at 429, it declared that Congress' objective "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." This recognition has been the

<sup>2</sup> Respondent discusses this canon and the Court's adherence to it at length in his brief (see Resp. Br. part II). Amici will not belabor these authorities.

consistent touchstone of the Court's Title VII decisions, McDonnell Douglas Corp v. Green, 411 U.S. 792, 800 (1973); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Teamsters v. United States, supra, 431 U.S. at 348; Dothard v. Rawlinson, 433 U.S. 321, 328 (1977). Most recently, in United Steelworkers of America v. Weber, U.S., 99 S. Ct. 2721, 2727 (1979), the Court declared that "Congress' primary concern...was with 'the plight of the negro in our economy.'"

Responsive to this objective, Title VII broadly prohibits employment discrimination and makes unlawful employment practices which "deprive and tend to deprive" any individual of employment opportunities based on race and other specified grounds. Employers and labor organizations alike are barred by the Act from engaging in such practices by Sections 703(a)-(d) and Section 704, 42 U.S.C. §§2000e-2(a), (d), 2000e-3.

The Act's prohibition of unlawful employment practices is stated in the broadest terms so as to reach all practices which deny or even may tend to deny the equal opportunity which Congress aimed to achieve,

and is subject only to limited exceptions and qualifications which have been given appropriately narrow constructions. Petitioners' argument here would have the anomalous result of allowing a uniquely broad construction for the seniority exception which would allow that exception to become the rule. No reason is apparent, for example, why the §703(h) seniority exception should sweep more broadly than that of §703(e) for bona fide occupational qualifications, which this Court has declared "was...meant to be an extremely narrow exception to the general prohibition of discrimination." Dothard v. Rawlinson, supra, 433 U.S. at 334.<sup>3</sup> The anomaly of a broad construction for §703(h)'s seniority exception is highlighted by the narrow construction given the same section's exception for use of professionally developed ability tests. In Griggs v. Duke Power Co., supra, 401 U.S. at 433-36, the

<sup>3</sup>As stressed by Justice Marshall in his concurring opinion in Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971), the "bfoq" exception "was not intended to swallow the rule." ~~See~~ Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Diaz v. Pan American World Airways, 442 F.2d 385, 387 (5th Cir. 1971). [continued next page]

Court rejected the contention that §703(h) protects professionally-developed ability tests where their use is not intentionally discriminatory. It narrowly construed the exception as immunizing only those tests where their use is not intentionally discriminatory. It narrowly construed the exemption as immunizing only those tests shown to be "demonstrably reasonable measures of job performance," and then only when no measure with lesser adverse impact is available, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425. Only recently, this Court took a similarly restrictive approach to the statement of qualification in §703(j) that nothing in Title VII "be interpreted to require... preferential treatment" to correct statistical imbalance in a particular workforce, United Steelworkers of America v. Weber, U.S., 99 S.Ct. 2721 (1979). The Court rejected the invitation to read Section 703(j) narrowly so as to buttress the upholding of such voluntary efforts and thus aid Congress' aim to end discrimination. The Court stressed that Congress had said only

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Cir. 1971), cert. denied 404 U.S. 950; Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).



that such efforts would not be required and not that they would not be permitted: "The Section does not state that 'nothing in Title VII shall be interpreted to permit' voluntary affirmative efforts to correct racial imbalances." United Steelworkers of America v. Weber, supra, 99 S.Ct. at 2729.<sup>4</sup>

There is nothing in Section 703(h)'s legislative history which indicates that Congress meant it to be a uniquely far-reaching qualifier on the remedial thrust of Title VII. On the contrary, the language of the "bona fide seniority system" clause is both imprecise and not fully considered by Congress.

Section 703(h) was added on the Senate floor to the bill which became Title VII, H.R. 7152 (1963), over six weeks after the insertion in the Congressional Record of the legislative materials on which Petitioners rely to show a broadly limiting Congressional intent--the Department of Justice Interpre-

<sup>4</sup>Petitioners read Weber as if the Court held that Title VII's prime goal was to assure the continued freedom of parties to collective bargaining to do generally as they wished. Their discussion of the case ignores that the Weber holding was dictated not by the value of unfettered collective bargaining for its own sake but by Congress' [continued next page]

tive Memorandum, the Clark-Case Memorandum, and Senator Clark's responses to Senator Dirksen's questions.<sup>5</sup> No discussion or debate accompanied these materials; they were simply published with a mass of Congressional documents. None of the House or Senate sponsors of either the original Title VII bill or the substitute measure and none of the authors of the legislative materials relied on by Petitioners ever drew any link between those materials and the later-added, vague terms of §703(h), or stated that Section 703(h) was intended to qualify Title VII's broad remedial thrust.<sup>6</sup> There is, moreover,

[from previous page]  
overriding aim to end illegal discrimination.

<sup>5</sup>The Justice Department memorandum appears at 110 Cong. Rec. 7207 (April 8, 1964); the Clark-Case Memorandum at 110 Cong. Rec. 7213 (April 8, 1964); and the Clerk-Dirksen exchange at 110 Cong. Rec. 7217 (April 8, 1964). Section 703(h) was part of an amended Title VII bill which was substituted for H.R. 7152 on May 26, 1964 (110 Cong. Rec. 12,813).

<sup>6</sup>See, e.g., remarks of Sen. Humphrey, 110 Cong. Rec. 12,723 (1964); remarks of Sen. Dirksen, 110 Cong. Rec. 12,818-19 (1964); remarks of Rep. Celler, 110 Cong. Rec. 15,896 (1964); remarks of Rep. McCullough, 110 Cong. Rec. 16,002 (1964).

specific legislative history demonstrating that Congress did not intend to confer on seniority systems a broad exemption from Title VII. On February 10, 1964 the House defeated a proposed amendment to H.R. 7152 which provided: "the provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system....," 110 Cong. Rec. 2727 (1964).

Moreover, the contents of the legislative materials from which Section 703(h) supposedly developed are anything but clear in indicating how far the Section's qualifying language was intended to cut into the sweep of Title VII. To the extent that they may be said to state any specific concern, it is to preclude the grant of super-seniority to blacks hired after Title VII's enactment which would place them ahead of whites hired before the Act, particularly in layoff situations.<sup>7</sup>

<sup>7</sup>The Clark-Case Memorandum states, in pertinent part:

[T]he employer's obligation would simply be to fill future vacancies on a non-discriminatory basis. He would not be obliged--or indeed permitted--to fire whites in order to

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The situations in which Congress intended §703(h) to apply, thereby limiting Title VII's potential reach, are best illustrated by Watkins v. United Steelworkers of America, Local Union No. 2369, 516 F.2d 43 (5th Cir. 1975). The plaintiff class there consisted of laid-off black employees, none of whom were the victims of any past hiring discrimination. At an earlier time the defendant company had discriminatorily denied hiring and, therefore, seniority accumulation to a different generation of black workers. The Fifth Circuit rejected the plaintiffs' claims, holding:

Inasmuch as none of the plaintiffs have suffered individual discrimination at the hands of the Company, however, there is no past discrimination toward them which the current maintenance of the layoff system could possibly perpetuate....

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hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier.

110 Cong. Rec. 7213 (1964) [emphasis added]. Similarly, the Department of Justice Memorandum states:

If...a collective bargaining contract provides that in the event of layoffs those who were hired last must be laid off first, such a

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...regardless of what that [Congressional] history may show as to Congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination,<sup>8</sup> there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.

The "express intent" found by the Fifth Circuit was enacted in Section 703(h), as explained by the Clark-Case materials and as explained below.

This Court followed the same narrow approach to the Section 703(h) exception in its first consideration of that provision. In Franks v. Bowman Transportation Co., supra, the Court disapproved a broad reading of the exception as barring an award of seniority relief to specific discrimination victims. The Court stressed the lack of demonstrated congressional intent to limit the relief available to discrimination victims, 424 U.S. at 762, and reasoned that availability

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provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.

<sup>8</sup> The reference is to the Section 703(h) issue then pending before this Court in Franks.

of such relief is essential to provide discrimination victims with a "make whole" remedy and thus satisfy Congress' objective, 424 U.S. at 767-68.

In International Brotherhood of Teamsters v. United States, supra, this Court for the first time considered the limiting language of Section 703(h) broadly. Even there, however, the Court stated that Section 703(h) does not "immunize all seniority systems" but only those which are bona fide, 431 U.S. at 353; its acceptance of the bona fides of that system rested substantially on the concession of the United States, as plaintiff and respondent, that the particular seniority system did not have its genesis in racial discrimination and that it was negotiated and maintained free from any illegal purpose, 431 U.S. at 356. Teamsters is of course not dispositive of the seniority-definition issue presented here, because the seniority system under scrutiny there was unquestionably based on length of service and thus fits within all parties' core concept of seniority. Indeed, the Court in Teamsters appeared to assume, correctly we would urge, that different types of seniority only arise from different measures of length of time in the pertinent class of



service:

[T]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide systems. Then, as now, seniority was measured in a number of ways, including length of time with a particular employer, in a particular plant, in a department, in a job, or in a line of progression.... The legislative history contains no suggestion that any one system was preferred.

431 U.S. at 355 n. 41.

Teamsters read much more into the legislative materials, which purportedly explain §703(h)'s vague language, than had any other court.<sup>9</sup> Its reading was founded on a view of the legislative history which identified underlying §703(h),

the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment as flowed from a bona fide seniority system that allowed for a full exercise of seniority accumulated before the effective date of the Act.

431 U.S. at 352. This analysis goes beyond

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<sup>9</sup>See, e.g., 431 U.S. at 378 n. 2. (Marshall, J., dissenting in part).

what the legislative materials clearly support and even command, in that it does not distinguish between protections offered to white incumbents as against minority workers who had not themselves accumulated seniority and who sought "fictional seniority", and as against those who had seniority and sought only to apply their accrued seniority rights to positions from which they had been excluded.<sup>9a</sup>

Teamsters was therefore a major incursion into the remedial effectiveness of Title VII and one not clearly commanded by the language or legislative history of §703(h), as construed in all previous appellate decisions. In the instant case, Petitioners ask the Court again to expand §703(h) greatly, building on the already expansive reading of that section contained in Teamsters. While we do not here question the Court's continuing adherence to the Teamsters reading of the section, we do suggest that the remedial policies of Title VII are ill-served by building further limitations on a foundation that itself extended the meaning of the stat-

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<sup>9a</sup>Even this language limits the protection afforded by §703(h) to pre-Act seniority. Petitioners' reading has no such limitation.

utory language.

Nothing in the legislative history of §703(h) or the documented concerns which it is presumed to codify remotely suggests that Congress considered whether to differentiate practices like Petitioners' 45-week rule from the application of typical Title VII standards. Any attempt to equate the 45-week rule to more traditional seniority rules based on length of service depends heavily on analogy and presumption to interpret a decidedly unclear Congressional purpose. Such speculative reasoning is not an appropriate basis for a novel construction of §703(h) which would undermine Title VII's remedial purpose.

2. The Court of Appeals Decision  
Excluding Non-Seniority Criteria  
From The Reach of §703(h)  
Correctly Implements Title VII's  
Remedial Purpose.

In this case, Petitioners advocate a sweeping reading of §703(h) which would immunize seniority and non-seniority criteria as well where such criteria--such as the 45-week rule--accompany seniority rules within a single priority system. The fault of Petitioners' arguments is that they sweep too far. Petitioners themselves acknowledge that the great bulk of collectively-bargained

schemes involve systems of job acquisition, promotion and retention which combine seniority and nonseniority factors--Petitioners call these "modified seniority systems"--and that only a minority involve "straight" seniority. The mere characterization of combined systems as "modified seniority systems" is necessarily a misnomer since such systems by definition comprise nonseniority rules. Yet Petitioners claim for such systems complete immunity under §703(h).<sup>10</sup> They argue that any collectively bargained priority system must be assessed as an integrated whole and that scrutiny of its individual components under a Griggs test is improper because it would necessarily trench on "seniority" expectations.<sup>11</sup> Such arguments, if accepted, would allow the seniority exception to swallow up the Act's prohibitions in a way even more destructive of

<sup>10</sup>As set forth below Amici EEAC and AFL-CIO propose accommodations somewhat limiting §703(h)'s application which are themselves untenable. See Part II, infra.

<sup>11</sup>One fault of this argument is that Franks itself by approving seniority relief for discrimination victims involves a shuffling of seniority expectations. Here, as shown below, the expectations affected are not genuinely "seniority" expectations be-  
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its objective than that disapproved in connection with the "bfoq" and ability test exceptions.<sup>12</sup> This is so because it would give carte blanche to the operation of practices of whatever sort whenever occurring within a collectively-bargained priority system based in any part on seniority. Thus, in a particular collectively-bargained system, job acquisition, promotion, retention--or transfer between seniority lines--might and most often does turn on a mixture of seniority and ability or other factors. Ability is often measured by such criteria as a test, an academic degree requirement, a height and weight requirement, or even the employer's unfettered discretion.<sup>13</sup> The result would be an application of §703(h) which would swallow up the normal adverse impact principles of Griggs. This is the inevitable consequence of Petitioners' contention that "seniority"

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cause achieving permanent status based on satisfying the 45-week rule is not a prerequisite of seniority.

<sup>12</sup> See p.12, supra.

<sup>13</sup> That is the case in connection with the system here since the employer retains the full right to choose among persons referred by the union pursuant to §§4 and 5 of the  
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means, not length of service, but rather whatever parties to collective bargaining say it means, and that all collectively-bargained priority systems are "seniority systems" covered in toto by §703(h).

It is implicit both in the statutory language and in Franks and Teamsters that the §703(h) exception does not extend to non-seniority aspects of a promotional system. If Congress meant to immunize not only bona fide seniority systems but also nonseniority aspects of promotional systems it would presumably have said so. Nothing in the legislative history indicates such an intent. Petitioners themselves stress that Congress did not consider the mechanics of seniority systems; instead, it simply confirmed through §703(h) that the operation of bona fide seniority systems would not be made unlawful. To infer a broader intent in connection with §703(h) would allow a particularized exception to swallow up general remedial prohibi-

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agreement (A. 38). In fact, it is most of the time the case as is indicated by U.S. Dept. of Labor Bulletin No. 1425-11, "Seniority in Promotion and Transfer Provisions," p. 7 (1970).



tions in a manner obviously inimical to Congress' overriding purpose. This is manifestly not a proper matter for inference.

The Court of Appeals' decision correctly recognized that Petitioners' contentions would allow the §703(h) exception to swallow up the rule of Griggs and cover not only such nonseniority criteria as the 45-week rule but the entire host of nonseniority practices heretofore held subject to normal adverse impact principles. To prevent this result it necessarily scrutinized the 45-week rule apart from other aspects of the collectively bargained system.<sup>14</sup> The Court of Appeals' decision should be affirmed.

<sup>14</sup> While petitioners claim this approach was error, it is consistent with every other post-Teamsters appellate decision distinguishing between seniority and nonseniority criteria, Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978), rehearing en banc granted (1979); Parson v. Kaiser Aluminum & Chemical Corp., 583 F.2d 132, 133 (5th Cir. 1978); and including Alexander v. Machinists' Area Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied 436 U.S. 946 (1978), on which petitioners rely for their assertion of conflict.

B. Achievement of Permanent Status Through Satisfaction of The 45-Week Rule Is Not A Perquisite Of "Seniority" Either As That Term Is Understood In Everyday Parlance Or In The Scholarly Literature, Government Bulletins, And Decisions Of This Court Relied Upon By The Employer And Union Parties.

According to Petitioners, the Court of Appeals erred in its view that "seniority" means length of service within an agreed upon seniority unit. They argue that organized labor and management may define and structure "seniority systems" in whatever manner suits their needs and that "seniority" can mean a host of things other than length of service.

As set forth below, Petitioners place unfounded reliance for these contentions on scholarly literature, government bulletins, and decisions of this Court. While those authorities recognize the broad flexibility enjoyed by unions and management in establishing rules of preference for job acquisition and retention, all such rules are not rules of seniority. Within a collectively-bargained preference system, seniority and nonseniority criteria most commonly operate in tandem. Petitioners' reliance

upon these authorities depends upon a semantic slight of hand; they attempt to cast the authorities' recognition of variations in the formation of collectively-bargained preference systems as support for their contention that such differences are all variations upon "seniority" or parts of "seniority systems". The attempt cannot succeed because the authorities uniformly conceive of seniority as length of service within an agreed-upon unit and view criteria other than length of service as nonseniority factors. None of the authorities support Petitioners' contention that collectively-bargained exceptions to seniority are in fact other forms of seniority.<sup>15</sup> While the flexibility accorded labor and management under national labor policy allows them to structure preference systems combining seniority and nonseniority factors to meet particular needs, this does

<sup>15</sup> A collective bargaining agreement might accord preference based on "seniority" and "ability" so as to deny preference to the most senior employee. This would not make "ability" into a form of "seniority;" it would not do so even if the agreement accomplished the same result by purporting to define "seniority" as "length of service plus ability." Ability remains a non-seniority factor just as does the criterion challenged here and cannot be brought within the Section 703(h) exception.

not mean that nonseniority criteria become criteria of seniority when operating in combination with seniority or that parties to collective bargaining can effect such transmutations through novel definitions of terms.

In common parlance, seniority means length of service. Webster's Third New Dictionary of the English Language Unabridged (1976) defines "seniority" as:

A status attained by length of continuous service (as in a company, institution, or organization or in a department, job rank, or occupational group) to which are attached by custom or prior collective agreement various rights or privileges (as preference in tenure, priority in promotion, and choice of work or shift) on the basis of ranking relative to others.<sup>16</sup>

<sup>16</sup> Amicus EEAC cites the dictionary definition of the term "system"--"a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose"--stressing that seniority operates within the context of a "system" (EEAC Br. p. 16). It proceeds to overlook the fact that the "diverse parts" comprising such systems most often comprise both seniority and nonseniority criteria. Accordingly, EEAC's argument simply begs the question whether Congress meant to include within Section 703(h) nonseniority criteria which  
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The scholarly literature and government bulletins cited by Petitioners and their amici confirm that the industrial usage of the term "seniority" is consistent with its common parlance meaning. In his law review article analyzing the nature of seniority rights, Professor Aaron defines seniority as follows:

Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement. Aaron, Reflections On The Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962).<sup>17</sup>

[from previous page]  
operate in combination with seniority in a collectively-bargained job preference system. The answer cannot be determined--as Petitioners and their amici seek to determine it--simply by calling such a combined system a "seniority system."

<sup>17</sup> While the Petitioners stress Professor Aaron's recognition that seniority may take many different forms (Employer Br., pp. 25, 38-39; Union Br., pp. 24-25), they ignore his threshold definition of "seniority" as "length of service".

The same is true of the seminal article of Professors Cooper and Sobol assessing the impact of Title VII on seniority and testing practices. Also recognizing that "seniority" means "length of service", they state:

The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker. Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969).<sup>18</sup>

Precisely the same is true of the comprehensive treatise on collective bargaining by Slichter, Healy and Livernash, The Impact of Collective Bargaining on Management (1960), on which the Union parties and the Amici in support of petitioners rely. Amici EEAC and AFL-CIO stress the treatise's statement that for competitive purposes seniority simply cannot be equated with "length of continuous service with the company" and that collectively-bargained definitions of seniority "are almost too varied to enumerate."

<sup>18</sup> Petitioners again omit reference to the article's threshold recognition that--although collectively-bargained preference systems may vary in infinite ways--seniority means length of service.



Slichter, et al., p. 116; EEAC Br., p. 16; AFL-CIO Br., p. 4. The treatise's ensuing discussion identifies the variations as differences in the way that length of service is measured from agreement to agreement and within agreements depending upon the particular purpose. The treatise characterizes collectively-bargained definitions of seniority which turn on criteria other than length of service as "unorthodox" and rather rare and finds "no evidence of any trend" toward their adoption, Slichter, et al., p. 122-23. The treatise itself uses seniority to mean length of service. For example, it states: "Rarely does one find a contract clause in which seniority is the exclusive criterion for deciding on promotions." Slichter, et al., p. 198.

Given the predominance of systems combining operation of seniority and nonseniority criteria, the rareness of provisions including factors other than length of service within the seniority definition--as opposed to within the overall preference system--tellingly demonstrates that seniority is most generally understood to mean length of service in an agreed upon unit and other operative factors are generally understood to be nonseniority criteria. And the legislative

history of Title VII includes not even a hint that when Congress enacted Section 703(h) it had in mind the relatively few, unorthodox seniority definitions departing from length of service.

The Department of Labor bulletins also conceive "seniority" as a job preference based on length of service in an agree-upon unit. They confirm that the great bulk of preference systems combine seniority factors with a variety of nonseniority factors. For example, U.S. Dept. of Labor Bulletin No. 1425-11, "Seniority in Promotion and Transfer Provisions" (1970), indicates that in structuring preference systems unions have generally advocated seniority factors while management has generally advocated non-seniority factors:

In management's view the selection of employees should be based on merit and ability rather than seniority, except where the qualifications of the employees being considered are relatively equal....

\* \* \* \*

Unions, on the other hand, are likely to question management's ability to judge accurately the relative qualifications of employees, and claim seniority based on length of service to be more equitable and objective. The absence of generally accepted standards, unions maintain, will inevitably

result in discrimination and favoritism.  
Bulletin No. 1425-11, p. 1.

The Bulletin recites that the great bulk of collectively-bargained preference systems combine seniority with a variety of nonseniority factors:

Of 1,201 agreements containing promotion details, 93 percent (1,112) covering 95 percent of the workers, indicated that seniority could be considered in making promotions..., but more often than not in combination with other factors, such as skill, merit, aptitude, etc. Promotion provisions based only on seniority, frequently considered impracticable by management and some unions for any but the most routine jobs or narrowest skills, were relatively rare. Such clauses occurred in only about 3 percent of the agreements having seniority provisions, and involved less than 2 percent of the workers. Bulletin No. 1425-11, p. 5.

The Bulletin recognizes the frequency of appearance of nonseniority factors without identifying them as "seniority:"

Nonseniority factors. Nine-tenths of the agreements having promotion provisions covering the same proportion of workers, stipulated that factors in addition to seniority would be considered. Bulletin No. 1425-11, p. 7 (footnotes omitted).<sup>19</sup>

<sup>19</sup>The bulletin summarizes the results of its survey as follows, id. p. 7:  
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Likewise, U.S. Dept. of Labor Bulletin

[from previous page]		Workers
Type of Agreement	Agreements	(In Thousands)
Total Agreements with Promotion Details	1,201	4,775.6
Total Agreements with Nonseniority Factors	1.080	4,264.5
Skill and Ability	792	3,116.4
Physical Fitness	242	993.5
Education or Training	97	294.2
Tests or Examinations	49	114.4
'Qualifications'	370	1,329.2
Other	33	143.4
Total Agreements Without Nonseniority Factors	121	491.1

This analysis is set forth in greater detail addressing agreements in particular industries in a Table at p. 39 of the Bulletin. The Bulletin unequivocally and consistently treats "seniority" as length of service and considers other factors as "nonseniority." The only scintilla of support for Petitioners' position appearing in the Bulletin is its observation--the same as that of the Slichter treatise--that a few agreements define seniority as a combination of length of service and other factors, Bulletin No. 1425-11, p. 5. Significantly, in the parlance of the Bulletin itself and that of the other authorities on which Petitioners rely "seniority" is "length of service" and other factors are "nonseniority".

No. 908-11 (1949), "Collective Bargaining Provisions-Seniority," recognizes that preference systems typically combine seniority and non-seniority factors:

Where length of service is the sole factor recognized, seniority is termed "straight" or "strict." Where the relative qualifications of the employees involved are given some weight, seniority is called "modified" or "contingent". U.S. Dept. of Labor Bulletin 908-11, p. 3.

This Bulletin as well recites that unions have favored length of service as the exclusive factor in determining employment preference while employers have "sought to modify strict seniority" by the recognition of such nonseniority factors as "qualification, skill, or ability to perform the available work." Bulletin No. 908-11, p. 2. Finally, U.S. Dept. of Labor Bulletin No. 1425-14, "Administration of Seniority" (1972), discusses collectively-bargained arrangements similar to the one here. In a chapter entitled--notably--"Separate Seniority Systems," the Bulletin takes up temporary and seasonal workers:

Companies in a number of industries frequently hire workers on a temporary or seasonal basis to meet increased workloads during the busy season, to serve as vacation relief-

men, to meet emergencies, or for special projects or production requirements....

\* \* \* \*

A few provisions permitted temporary or season employees seniority, but only among themselves....

\* \* \* \*

Twenty-five agreements in the sample dealt with the seniority status of temporary or seasonal employees in the event they acquired regular employee status...." U.S. Dept. of Labor Bulletin No. 1425-14, pp. 11-12.

The Bulletin's chapter on Separate Seniority Systems is plainly supportive of the Court of Appeals' observation that the collective bargaining agreement in this case contained separate seniority systems for permanent and temporary employees and that the acquisition of permanent status was not itself part of either.

The same responses apply to Petitioners' reliance upon this Court's decisions in Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949), and Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Those decisions also recognize the leeway accorded to collective bargaining parties in structuring job preference systems. Based on that recognition, the Court upheld aspects of collectively-



bargained preference systems against attack by persons asserting violation of seniority rights. Nothing in those cases turned upon a determination whether or not the provisions in question were perquisites of seniority.<sup>20</sup>

Campbell was a suit by returned veterans asserting deprivation of seniority rights incident to a lay-off when employees junior to them were retained pursuant to a provision according retention preference to union grievance chairmen. The Court upheld operation of the grievance chairmen preference as a permissible result of collective bargaining. It has no occasion to conclude that this preference was a perquisite of "seniority". Petitioners rely on the decision because in upholding the provision for retention of the union chairmen the Court referred to it as a "seniority preference," 337 U.S. at 528, n. 5. At the same time, however, the Court characterized the

<sup>20</sup> In contrast, the cases relied upon below in part C do turn upon the distinction between seniority and nonseniority criteria and establish a test under which the criterion involved here is plainly not a perquisite of seniority.

retention as "beyond the routine requirements of seniority," id. The retained veterans in Campbell did not prevail because they had been accorded precisely the same seniority credit they would have accrued had they remained in civilian employment. Having suffered no "loss of seniority", they had no meritorious complaint against operation of a legitimate retention preference for union grievance chairmen.<sup>21</sup>

Ford Motor Co. v. Huffman, supra, was a suit by employees asserting violation of seniority incident to a lay-off when other employees were retained pursuant to a provision according seniority credit for pre-employment military service. As in Campbell, the Court upheld operation of the collectively-bargained provision based on the leeway properly accorded to employers and unions in constructing job preferences through collective bargaining. Again, nothing turned on whether or not the particular preference under challenge was a perquisite of senior-

<sup>21</sup> That the grievance chairmen's preference is not a perquisite of seniority is confirmed by Bulletin No. 908-11, supra, p. 36, which lists such provisions among several exceptions to seniority rules.

ity.<sup>22</sup>

Similarly, no support for petitioners' contentions can be found in the existence of analogues to the 45-week rule in other collective bargaining agreements (see Brief of Amicus AFL-CIO, pp. 28 et seq.). Whether such provisions are common or uncommon is not relevant to whether they are rules of seniority. Indeed, the single decision addressing that issue--as set forth below in Part C--hold that a provision virtually on all fours with that here is not a rule of seniority. Suffice it to say here that the Court of Appeals' holding that permanent status based on the 45-week rule is not a perquisite of seniority is wholly consistent with the usage of that term as reflected by the very authorities on which petitioners rely. To ascribe a broader meaning

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<sup>22</sup> Though nothing turned on the inquiry in that case, the credit for pre-employment military service presumably is a perquisite of seniority. It is a part of the employee's overall length of service and it is a credit which would have automatically accrued had the employee entered civilian employment at an earlier time instead of going into military service. See Part C, infra. As such it is unlike permanent status based on satisfaction of the 45-week rule which would not be expected to accrue with the mere passage of time.

to the term in construing an exception to a remedial statute would be contrary both to the standard usage of the term and established principles of construction heretofore followed by this Court.

C. The Court Of Appeals' Holding That Attainment Of Permanent Status Based On The 45-Week Rule Is Not A Seniority Perquisite Is Supported By Decisions Of This Court And Lower Federal Courts Distinguishing Between Seniority And Other Benefits.

In concluding that satisfaction of the 45-week rule is not a perquisite of seniority, the Court of Appeals reasoned that seniority rights by their nature develop automatically with the passage of time: "Under a seniority system, rights normally accrue automatically in the absence of resignation, termination, or transfer." (Pet. A. 11 , 585 F. 2d at 427). The Court of Appeals observed that this was not the case with the 45-week rule. Rather than growing automatically with the passage of time, "...an employee's chances of satisfying the provision automatically terminate at the end of each year," id. The Court of Appeal proceeded to distinguish plant seniority under the agreement before it from permanent status: "...[P]lant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically." Id.

The Court of Appeals' reasoning is supported - and its conclusion compelled - by decisions of this and lower federal courts in the single other area of federal labor law calling for distinctions between seniority and nonseniority perquisites. Those decisions - addressing the employment rights of returning veterans - forcefully buttress the Ninth Circuit's conclusion. Significantly, this Court in Franks v. Bowman Transportation Co., 424 U.S. at 778, has already found reference to those decisions pertinent to resolution of seniority issues under Title VII.

Under the Military Selective Service Act, 50 U.S.C. App. §451, et seq., and its predecessors, Congress has sought to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces. Section 9 of the Act now in force, 50 U.S.C. App. §459, guarantees reinstatement with the same levels of seniority, status, and pay that the individual would have enjoyed had he remained in civilian employment. Section 9(c)(1) of the Act distinguishes between rights of seniority and other benefits. Returning veterans are reinstated "without loss of seniority";



with respect to "other benefits", however, they are entitled to participate only "pursuant to established rules and practices relating to employees on furlough or leave of absence...." Thus, veterans receive the seniority benefits they would have accrued without regard to rules and practices governing furloughed employees - but are entitled to other benefits only to the same extent as furloughed employees. This Court has had several occasions to apply these principles and to distinguish between "seniority" and "other" benefits, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946); Oakley v. Louisville & Nashville R. Co., 338 U.S. 278 (1949); Kinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265, 272 (1958); Tilton v. Missouri Pacific R. Co., 376 U.S. 169 (1964); Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966); Eagar v. Magnia Copper Co., 389 U.S. 323 (1967); Foster v. Dravo Corp. 420 U.S. 92 (1975); Alabama Power Co. v. Davis, 431 U.S. 581 (1977).

The thread common to all of these decisions was articulated by the Court in Foster v. Dravo Corp., supra:

[T]he Court has consistently applied the statute to assure that benefits and advancements that would necessarily have accrued by virtue of continued employment would not be denied the veteran merely because of his absence in the military service.... On the other hand, where the claimed benefit requires more than simple continued status as an employee, the Court has held that it is not protected by the statute. 420 U.S. at 97.

Thus, while the Court has treated as "seniority" those benefits which would necessarily have accrued it has treated as "other" benefits those which would not.

The decisions holding that seniority does not encompass perquisites which would not necessarily accrue with the passage of time provide especially forceful support for the Court of Appeals' decision because they arose in a statutory context where seniority has been broadly construed in order to carry out Congress' single objective of protecting returned veterans, Fishgold, supra, 328 U.S. at 285; Accardi, supra, 383 U.S. at 229. As set forth in Part I-A, supra, no such broad construction of seniority is appropriate here; to the contrary the seniority exception of Section 703(h), like other exceptions to rules

generally imposed by remedial statutes, should be construed narrowly. Therefore, conclusions reached in returned veterans cases that particular employment perquisites are not aspects of seniority, apply a for-iori here. At the same time, results based on concepts of seniority stretched to fulfill Congress' aim of protecting returned veterans would be of doubtful application.

In Accardi, the Court did construe seniority expansively so as to include severance payments based on length of service and thereby entitle veterans to full credit for military time. Looking to Congress' purpose to protect rights of veterans that "would have automatically accrued" had they remained in private employment, the Court reasoned that the severance credits in that case would have accrued practically automatically in that a full year's credit could be achieved by working a mere seven days. The Accardi Court reasoned further that severance pay was not compensation for service during a particular year - as stated, a mere seven days of service could yield a year's credit - but rather was compensation for loss of a job computed in

proportion to seniority.<sup>23</sup> Notably, in Foster v. Dravo Corp., supra, the Court stated that it had in Accardi extended the seniority concept "to a benefit not traditionally considered a seniority right", 420 U.S. at 97, but declined to extend the concept even further to cover entitlement to vacation pay for years in which the veteran was absent. Even though full credit for the year could have been achieved by virtue of only a few "carefully spaced hours of work," Foster v. Dravo Corp., 420 U.S. at 100, and could therefore be said to be accrue almost automatically, the Court concluded that vacation pay was a benefit rewarding time actually worked and not a perquisite of seniority. Significantly, the Court stated that the demand for vacation pay in Foster

... would extend the statute well beyond the limits set out in our prior cases. Generally, the presence of a work requirement is strong

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<sup>23</sup> The Court stated:

The requirements of the ... Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. Accardi, supra, 383 U.S. at 230.

evidence that the benefit in question was intended as a form of compensation. 400 U.S. at 99.

The same can be said even more definitely of the work requirement in this case which - unlike those in Accardi and Foster - requires not a mere few days or hours of work but of 45 complete weeks within a calendar year.

Under this Court's most recent articulation of the test for distinguishing seniority from other benefits in Alabama Power Co. v. Davis, supra, the rule involved here is plainly not a rule of seniority:

If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a 'perquisite of seniority.' If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short term compensation for services rendered, it is not an aspect of seniority within the coverage of §9. 432 U.S. at 499 .

Here, the benefit of permanent status does not accrue with reasonable certainty based on continuous employment nor is it predicated on length of service. It can-

not therefore be a perquisite of seniority.

That this is so is indicated most plainly by Cox v. International Longshoremen's Assn., Local 1273, 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd 476 F. 2d 1287 (5th Cir., 1973), cert. denied, 414 U.S. 1116. That case involved a provision - virtually on all fours with the 45-week rule in this case - which required longshoremen to work at least 1200 hours in a calendar year to advance out of the casual classification to the "D-1 classification." There, as here, employees in the superior classification enjoyed preference in work opportunities. The Court observed that satisfaction of the 1200 hour rule and consequent advancement from "D" to "D-1" status could not reasonably be expected:

The facts in this lawsuit make it perfectly clear that advancement from casual or D status employment to D-1 classification requires affirmative discretionary action of management. While it is true that, once a casual longshoreman accumulates 1,200 hours in a fiscal year, he is automatically entitled to a D-1 seniority classification, the attainment of 1,200 hours in a fiscal year is not simply a matter of continuous employment. The casuals or D classified men are not pre-selected, by



application or otherwise, by management. The selection of casuals for any work at all is a result of a daily exercise of supervisory discretion performed by numerous gang foremen throughout the year. Fitness, ability, agility, strength, reliability, experience, acquaintanceship and even being related to another longshoreman are some of the factors commonly given consideration by gang foremen in choosing their gangs. This daily selection process serves to eliminate the vast majority of the casual laborers. Since there is a huge surplus of men for the available work in this industry, there is simply no reasonable certainty that casuals as a group will attain seniority status. In fact, in 1968, the year plaintiffs Cox and Palmer obtained D-1 classification, only four percent of the casuals actually made this advancement.<sup>24</sup>

Cox, supra, 343 F. Supp. at 1299-1300.

Stating that advancement to "D-1" status was "obviously the exception and not rule," the Court concluded that such status was not a perquisite of seniority under the Military Selective Service Act. The

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<sup>24</sup> This case is like Cox in that attainment of permanent status based on the 45-week rule is not automatic or even reasonably to be expected with the passage of time. In addition, as in Cox, while the collective bargaining agreement provides for referral of temporary employees in line with their seniority, it leaves to the employers absolutely unfettered discretion in selecting among them (A.38, Agreement, Sec. 5(c)(2)).

District Court opinion in Cox was adopted by the Court of Appeals' order of affirmance and certiorari was denied. Only by the anomalous act of construing seniority more broadly under Section 703(h) than it was properly construed under the Military Selective Service Act in Cox could this Court hold that the Ninth Circuit was mistaken and reach the result advocated by Petitioners.

II. THE PROPOSED SOLUTIONS OFFERED BY AMICI EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE AFL-CIO, WHILE DISPLAYING GREATER SENSITIVITY TO TITLE VII'S GOALS THAN THE POSITIONS TAKEN BY PETITIONERS, ARE ALSO UNTENABLE.

The Briefs of Amici Equal Employment Advisory Council and the AFL-CIO implicitly recognize the difficulty inherent in the positions taken by the Petitioners. Thus, they recognize that if seniority systems were to enjoy blanket protection impervious to scrutiny of their individual components, the result would be necessarily to allow Section 703(h) to swallow up the normal rule of Griggs and immunize the entire gamut of nonseniority criteria in cases where such practices are integrated under the umbrella of a "seniority system". (EEAC Br., pp.29, et seq.; AFL-CIO Br., pp. 24-25, n. 10).

Amicus EEAC offers a proposed accommodation of Section 703(h) with the rule of Griggs in Section III-C of its Brief. It suggests that a requirement with adverse impact not stemming from perpetuation of a past practice - such as passing a test - would be outside the protection

of Section 703(h) despite its nexus to a "seniority system."<sup>25</sup> EEAC says that requirements whose adverse impact stems solely from a tendency to perpetuate past acts are protected by Section 703(h). It asserts that the 45-week rule enjoys Section 703(h) protection as such a requirement.

While EEAC's argument displays more sensitivity to Title VII's goals than those of the Petitioners, it is also untenable because it offers no logical ground for distinguishing between adverse impact which stems from perpetuation of past discrimination and that which does not. If - as EEAC argues along with Petitioners - Congress meant broadly to protect employee expectations arising from the operation of "seniority systems," there is no basis for EEAC's suggested distinction between the two forms of adverse impact. Were "permanent" status hinged not upon passing a test, eliminating the test would cause the same "reshuffling" of employee expectations.

<sup>25</sup> Thus EEAC concedes the propriety of separate scrutiny of individual component criteria of a preference system.

The basic flaw of EEAC's position is that while it recognizes the difficulties inherent in the claim of absolute, blanket protection for "seniority systems", it nevertheless asserts an unduly broad construction of "seniority". EEAC argues that seniority under Section 703(h) should be "broadly construed", a position inconsistent with the principle that exceptions to the general provisions of remedial statutes should not be so construed. In fact, EEAC - like the Petitioners - argues for a construction of seniority under Section 703(h) broader than that articulated by this and lower courts in construing seniority under the Military Selective Service Act and its predecessors. By that measure, permanent status under the collective bargaining agreement involved in this case cannot be a perquisite of seniority because it does not accrue automatically - indeed, cannot even be reasonably expected to accrue - with passage of time as an employee. To call employee expectations founded upon such a rule "seniority expectations" and thus claim for them protection under Section 703(h) is simply to play with words. Implicit in the Court

of Appeal's decision is the correct recognition that expectations founded upon a nonseniority rule cannot be "seniority expectations". This is no less so when the particular nonseniority rule has an adverse impact apart from perpetuation of past discrimination than when perpetuation of past discrimination is the sole adverse impact.

EEAC's approach must be rejected because it calls for a construction of "seniority" ranging far beyond that applied by this and lower courts in a setting where a broad construction of that term is mandated. It is inconsistent with the principle of Griggs that employment practices with adverse impact are equally susceptible to Title VII attack whether or not such impact stems from the perpetuation of a past practice.

The AFL-CIO suggests a different approach, Br. 24-25, n. 10. It acknowledges the operation of nonseniority factors which "override" seniority in many collectively-bargaining systems. It suggests that Section 703(h) should not extend to decisions based on such factors to bypass the most senior employee; such decisions, it says, should be "measured by Title VII's commands



exclusive of §703(h)." We agree with this position as far as it goes. At the same time, however, the AFL-CIO's position would allow labor and management simply to incorporate the same other factors into their definition of seniority and thereby bring them within the Section 703(h) seniority exception. It would be the ultimate oddity to apply different legal tests to selection decisions turning upon the same criteria depending merely on whether or not labor and management include nonseniority criteria within their definition of seniority as opposed to referring to them outside the seniority definition as factors which would override seniority. Notably, the AFL-CIO does not suggest that Congress actually intended such a distinction. Certainly nothing in the legislative history suggests that it did. As a possible accommodation of general Title VII rules with the Section 703(h) seniority exception, the approach must be rejected because of the irrational consequences discussed above and because it would allow parties to collective bargaining to expand the scope of the Section 703(h) exception through the breadth of their own seniority definitions.

The Court of Appeals' decision, rather than the proposals suggested by Amici EEAC and AFL-CIO, represents the proper accommodation of general Title VII rules with the seniority exception. It is only by scrutiny of the individual elements of a preference system that a court may separate seniority criteria subject to Section 703(h) from nonseniority criteria whose adverse impact, of whatever sort, is subject to attack under Griggs... It is only this approach which prevents the Section 703(h) exception from swallowing up Title VII's general rules. To the extent that this approach may result in a "reshuffling" of expectations, the expectations affected are not expectations based on seniority and therefore cannot properly command protection under Section 703(h).<sup>26</sup>

#### CONCLUSION

The Court of Appeals properly determined that this matter should be remanded to the District Court to allow proof of the challenged practice's adverse impact, if any. For the reasons stated herein, the

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<sup>26</sup> Compare, Franks v. Bowman Transportation Co., supra, 424 U.S. at 775-79  
[continued next page]

decision of the Court of Appeals should be affirmed.

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Respectfully submitted,

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[from previous page] (modifications of employee expectations are no bar to appropriate seniority remedies for Title VII violations and in other statutorily commanded circumstances).